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Newton Estes v. Judge Don V Tibbs : Newton Estes v. Judge Kenneth Rigtrup, Judge James Sawaya : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

NEWTON ESTES, Plaintiff/Appellant, v. JUDGE DON V TIBBS, Defendant/Appellee	Supreme Court Consolidated Case No. 970193
NEWTON ESTES, Plaintiff/Appellant, v. JUDGE KENNETH RIGTRUP, JUDGE JAMES SAWAYA, Defendant/Appellee.	Priority No. 15

BRIEF OF APPELLANT

Consolidated Appeals from Orders of the Third and Sixth Judicial District Courts,
Judges Hilder and McIff

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STATEMENT OF JURISDICTION

This Court has jurisdiction over these consolidated cases pursuant to section 78-2-2(3)(j) of the Utah Code.

STATEMENT OF ISSUES, STANDARDS OF REVIEW, AND PRESERVATION OF ISSUES FOR APPELLATE REVIEW

1. Whether the district courts properly dismissed claims brought by Mr. Estes against the named district court judges on the basis that he failed to comply with the notice-of-claim provisions of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-11, -12.

This issue is a question of law that is reviewed for correctness. See State v. Pena, 869 P.2d 932, 936 (Utah 1994); City of St. George v. Turner, 860 P.2d 929, 932 (Utah 1993).

This issue has been preserved for appellate review at Tibbs R. 36-37, 146-47, and 179-80;[1] Rigtrup R. 35-36, 153-54, and 173-74;[2] Sawaya R. 26-28, 154-55, and 185-86.[3]

2. Whether the district courts properly dismissed claims brought by Mr. Estes against the named district court judges on the basis that those claims were barred by applicable statutes of limitation.

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[1] The record in Estes v. Tibbs, Dist. Ct. No. 960601239 (6th Dist. Ct), is referred to herein as "Tibbs R."

[2] The record in Estes v. Rigtrup, Dist. Ct. No. 960905255 CV (3rd Dist. Ct), is referred to herein as "Rigtrup R."

[3] The record in Estes v. Sawaya, Dist. Ct. No. 96090955 CV (3rd Dist. Ct), is referred to herein as "Sawaya R."

This issue is a question of law that is reviewed for correctness. See Gramlich v. Munsey, 838 P.2d 1131, 1132 (Utah 1992); see also State v. Pena, 869 P.2d 932, 936 (Utah 1994); City of St. George v. Turner, 860 P.2d 929, 932 (Utah 1993).

This issue has been preserved for appellate review at Tibbs R. 37-38, 146-47, and 180; Rigtrup R. 36-37, 154, and 173-74; Sawaya R. 28-29, 155, and 185-86.

3. Whether the district courts properly dismissed claims brought by Mr. Estes on the grounds that those claims were barred by the doctrine of collateral estoppel.

This issue is a question of law that is reviewed for correctness. See State v. Pena, 869 P.2d 932, 936 (Utah 1994); City of St. George v. Turner, 860 P.2d 929, 932 (Utah 1993).

This issue has been preserved for appellate review at Rigtrup R. 37-39, 155-56, and 173-74; Sawaya R. 29-31, 154-58, and 185-86.[4]

4. Whether the district courts properly ruled that Mr. Estes' failed to state a claim for relief under section 78-35-1 of the Utah Code because the conduct of the district court judges, as alleged in the complaint, was not "wrongful[] or willful[]" as a matter of law.

This issue is a question of law that is reviewed for correctness. See State v. Pena, 869 P.2d 932, 936 (Utah 1994); City of St. George v. Turner, 860 P.2d 929, 932 (Utah 1993).

This issue has been preserved for appellate review at Rigtrup R. 39-42,

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[4] The district court in the Tibbs case rejected the Judge's argument that Mr. Estes' claim was barred by the doctrine of collateral estoppel and, consequently, this is not an issue in that case.

156-57, and 173-74; Sawaya R. 31-33, 154-58, and 185-86.[5]

DETERMINATIVE STATUTES

Utah Code Ann. § 78-35-1:

> Any judge, whether acting individually or as a member of a court, who wrongfully and willfully refuses to allow a writ of habeas corpus whenever proper application for the same has been made shall forfeit and pay a sum not exceeding $5,000 to the party thereby aggrieved.

Utah Code Ann. §§ 63-30-11:

> (1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.
> (2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.
> (3) (a) The notice of claim shall set forth:
> (i) a brief statement of the facts;
> (ii) the nature of the claim asserted; and
> (iii) the damages incurred by the claiming so far as they are known.
> (b) The notice of claim shall be:
> (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
> (ii) directed and delivered to the responsible governmental entity according to the requirement of Section 63-30-12 or 63-30-13.
> (4) (a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

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[5] The district court in the Tibbs case rejected the Judge's argument that Mr. Estes had failed to state a claim under section 78-35-1 and, consequently, this is not an issue in that case.

(b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

(ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

Utah Code Ann. § 63-30-3(1):

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

Utah Code Ann. § 63-30-2(5):

"Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

Utah Code Ann. §§ 78-12-29:

An action may be brought within one year:

(1) for liability created by the statutes of a foreign state;

(2) upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;

(3) upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;

(4) for libel, slander, assault, battery, false imprisonment, or seduction;

(5) against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;

(6) against a municipal corporation for damages or injuries to property caused by a mob or riot;

(7) on a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent

Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to four years, under Section 25-6-10; or

(b) Subsection 25-6-6(2).

Utah Code Ann. § 78-12-25:

An action may be brought within four years:

(1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1);

(3) for relief not otherwise provided for by law.

Relevant portions of any other statute or rule are set forth in the body of the brief.

STATEMENT OF THE CASE

Nature of the Case

These consolidated cases stem from the dismissal of three "petitions"[6] filed by Mr. Estes, acting pro se, against three district court judges. [Tibbs R. 1-3; Rigtrup R. 1-3; Sawaya R. 1-2]. Although the factual basis for each complaint is slightly different, all were filed pursuant to section 78-35-1 of the Utah Code, contending that the named defendants "wrongfully and willfully refuse[d] to allow a writ of habeas corpus when[]

[6] Although the pleadings were styled "Petition for Recovery of Monetary Penalty," they have at all times been treated as complaints, filed in accordance with Rules 3 and 7 of the Utah Rules of Civil Procedure.

proper application for the same" had been made by Mr. Estes. See Utah Code Ann. § 78-35-1.[7]

The complaint against Judge Tibbs stems from the following facts, which Mr. Estes has alleged violate section 78-35-1: (i) Judge Tibbs dismissed a habeas petition filed by Mr. Estes[8] on the sole ground he had named as the defendant the warden of the Central Utah Correctional Facility who was not alleged to have deprived Mr. Estes of any constitutional right, but whose only connection to Mr. Estes was the fact that he was warden of the prison where Mr. Estes was housed;[9] (ii) Following remand of that case, Mr. Estes amended his writ to join the Utah Board of Pardons, but when he attempted to file it, the court informed him that the Sixth Circuit Court, where he originally filed the writ, no longer existed; and (iii) When Mr. Estes was finally able to locate the proper court to file the amended writ, the court refused to accept it without a filing fee or writ of impecuniosity, even though it was an amendment to his original writ, and even though Utah law prohibits charging a filing fee. [Tibbs R. 1-3].

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[7] Section 78-35-1 provides,

> Any judge, whether acting individually or as a member of a court, who wrongfully and willfully refuses to allow a writ of habeas corpus whenever proper application for the same has been made shall forfeit and pay a sum not exceeding $5,000 to the party thereby aggrieved.

[8] Mr. Estes' petition challenged the constitutionality of conduct by the Board of Pardons following this Court's decision in Foote v. Board of Pardons, 808 P.2d 734 (Utah 1991).

[9] Mr. Estes subsequently appealed Judge Tibbs' ruling. The Utah Court of Appeals affirmed on a different basis. That court held the Board of Pardons, in addition to the warden, should have been named defendants. Estes v. Van Der Veur, 824 P.2d 1200, 1202 (Utah Ct. App. 1992).

The complaint against Judge Rigtrup stems from the following facts, which Mr. Estes has alleged violate section 78-35-1: On or about April 5, 1990, Judge Rigtrup denied a writ of habeas corpus filed by Mr. Estes[10] on the grounds that the issues it raised (i) were identical to issues previously raised by Mr. Estes on the appeal of his conviction, or were raised and decided on appeal, and (ii) Mr. Estes had failed to allege "unusual circumstances" justifying an exception to the general rule that a petitioner may not raise issues in postconviction proceedings that could and should have been raised on direct appeal. [Rigtrup R. 44-45].[11] During the hearing on the motion to dismiss his writ, Judge Rigtrup stated "[t]his Court cannot correct another district judge, or second guess him, because of his judgement exercised in sentencing." [Rigtrup. R. 1-2]. Mr. Estes also offered the Court evidence of "unusual circumstances" justifying an exception to the general rule regarding issues that may be raised in postconviction proceedings. [Rigtrup R. 2]. In his complaint, Mr. Estes alleges Judge Rigtrup's conduct amounts to a wrongful and willful refusal to issue a writ of habeas corpus. [Rigtrup R. 1-2].

The complaint against Judge Sawaya stems from the following facts, which Mr. Estes has alleged violate section 78-35-1: Following Judge Rigtrup's dismissal of Mr. Estes' writ, he filed a habeas petition in the Third District Court, which was assigned to Judge Sawaya. [Sawaya R. 1]. In this petition, Mr. Estes sought to raise a claim for ineffective assistance of appellate counsel. The ineffectiveness claim was based upon

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[10] Mr. Estes originally filed his writ in this Court, and the Court referred it to the Third District Court.

[11] Mr. Estes appealed Judge Rigtrup's decision to this Court, and the Court denied Mr. Estes' petition. [Rigtrup R. 45].

appellate counsel's refusal to raise a claim for ineffective assistance of trial counsel. [Sawaya R. 47]. The State moved to dismiss the petition.[12] Relying on Rule 4-501 of the Utah Code of Judicial Administration, Judge Sawaya dismissed the petition on the grounds that Mr. Estes had failed to demonstrate why this issue had not been previously raised in the habeas petition that had been dismissed by Judge Rigtrup. [Sawaya R. 47-48].[13] Rule 4-501, however, expressly states that it "does not apply to petitions for habeas corpus or other forms of extraordinary relief. Utah Code Jud. Admin. Rule 4-501, Applicability. Mr. Estes' complaint alleges that Judge Sawaya's reliance on Rule 4-501 as a basis for dismissing his habeas petition amounts to a wrongful and willful refusal to issue a writ of habeas corpus. [Sawaya R. 1-2].

Course of Proceedings and Disposition Below

On July 26, 1996, Mr. Estes filed his complaint against Judge Tibbs in the Sixth Judicial District Court in and for Sanpete County, State of Utah. [Tibbs R. 1-2]. On or about November 7, 1996, the Judge filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) and (1) of the Utah Rules of Civil Procedure along with a supporting memorandum of points and authorities. [Tibbs R. 33-143].[14] The Judge's motion was

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[12] Although it is not clear from the record, it appears that Mr. Estes was not given an opportunity to respond to the State's motion to dismiss.

[13] Mr. Estes appealed Judge Sawaya's dismissal and, on October 18, 1991, the Utah Court of Appeals, in an unpublished, per curiam opinion, affirmed Judge Sawaya's ruling. [Sawaya R. 49-51]. The court of appeals, however, did not consider the Rule 4-501 issue. [Id.]

[14] Although counsel for the Judge ostensibly brought the motion under Rule 12(b)(6) and (1), counsel submitted to the district court two affidavits and a number of unverified documents in support of the motion. Thus, the motion should have been

briefed and, following oral argument, the district court dismissed Mr. Estes complaint on the grounds that his claim (i) was barred because he failed to comply with notice provisions of Utah's Governmental Immunity Act, Utah Code Ann. §§ 63-30-11, -12; and (ii) was barred by the statute of limitations, Utah Code Ann. §§ 78-12-25, -29. [Tibbs R. 179-80]. The district court did not mention, and therefore implicitly rejected, the Judge's arguments that Mr. Estes' claim was barred by the doctrine of collateral estoppel, and that the conduct Mr. Estes alleged did not amount to a violation of section 78-35-1 as a matter of law. On March 17, 1997, Mr. Estes filed a Notice of Appeal. [Tibbs R. 179].

On July 29, 1996, Mr. Estes filed his complaint against Judge Rigtrup in the Third Judicial District Court in and for Salt Lake County. [Rigtrup R. 1-3]. On or about November 6, 1996, the Judge filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) and (1) of the Utah Rules of Civil Procedure along with a supporting memorandum of points and authorities. [Sawaya R. 29-149].[15] This memorandum raised the exact same issues as the motion filed in the Tibbs case. Following briefing and oral argument, the district court dismissed Mr. Estes complaint on the grounds that his claim (i) failed to comply with notice provisions of Utah's Governmental Immunity Act; (ii) was barred by the statute of limitations; (iii) was barred by the doctrine of collateral estoppel because substantially similar claims had been asserted by Mr. Estes in a federal

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brought pursuant to Rule 56, and should be treated by this Court as a motion for summary judgment.

[15] Again, counsel for the Judge offered evidence outside the pleadings in support of the motion, and the motion therefore must be treated as a motion for summary judgment.

court action against Judge Rigtrup, among others; and (iv) was barred because the conduct alleged by Mr. Estes did not amount to a violation of section 78-35-1 as a matter of law. [Rigtrup R. 173-74]. On March 17, 1997, Mr. Estes filed a Notice of Appeal. [Rigtrup R. 179].

On August 26, 1996, Mr. Estes filed his complaint against Judge Sawaya in the Third Judicial District Court in and for Salt Lake County. [Sawaya R. 1-2]. On November 6, 1996, the Judge filed a motion to dismiss and supporting memorandum seeking dismissal of the complaint on the same grounds as those set forth in the Tibbs and Rigtrup cases. [Sawaya R. 21-147]. Following briefing and oral argument, the district court dismissed the complaint on the same grounds as the Rigtrup case. [Sawaya R. 185-87]. Mr. Estes filed his Notice of Appeal on March 17, 1997. [Sawaya R. 188].

This Court consolidated all three cases for purposes of appeal, and appointed counsel to represent Mr. Estes.

STATEMENT OF RELEVANT FACTS

A statement of facts beyond that set forth in the Statement of the Case set forth above is not necessary to the resolution of the issues presented in this appeal.

SUMMARY OF ARGUMENT

The district court incorrectly dismissed Mr. Estes' complaints on the grounds they were barred by the notice-of-claim provisions of the Utah Governmental Immunity Act. That Act, however, does not apply to Mr. Estes' claims under section 78-35-1 because his claims are not for an "injury" as that term is defined in the Governmental Immunity Act. Mr. Estes' claims also were dismissed as untimely.

However, neither the Judges, nor the district courts, have properly considered Mr. Estes' argument that the limitation period should be tolled.

Two of Mr. Estates' complaints were dismissed as being barred by the doctrine of collateral estoppel. That doctrine, however, does not apply because the claims he asserted in federal court against the Judges were different than the claims raised in the complaints below; and in addition, the federal court claims were not competently, fully, and fairly litigated. Finally, two of the district courts concluded that Mr. Estes had not stated a claim for violation of § 78-35-1. Mr. Estes maintains that these decisions were erroneous and should be reversed.

ARGUMENT

I. THE DISTRICT COURTS IMPROPERLY RULED THAT MR. ESTES' CLAIMS WERE BARRED BY UTAH GOVERNMENTAL IMMUNITY ACT.

In each of the consolidated cases, the district courts dismissed Mr. Estes' complaints on the ground that he had failed to comply with the notice-of-claim provisions of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-11(2), -12, -15. The district courts found that because Mr. Estes had failed to provide written notice to the Attorney General's office within one year after Mr. Estes' claims arose, his lawsuits were jurisdictionally barred. [Tibbs R. 179-80; Rigtrup R. 173-74; Sawaya R. 185-87].

The Utah Governmental Immunity Act, including its notice-of-claim provisions, does not apply to Mr. Estes' claims under section 78-35-1 of the Utah Code. The Governmental Immunity Act provides governmental entities limited immunity from suit for any "injury" which results from, among other things, the exercise of a governmental

function. See Utah Code Ann. § 63-30-3. The notice-of-claim provision states, "[a]ny person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties . . . shall file a written notice of claim . . . ." Utah Code Ann. § 63-30-11(2) (emphasis added). The act defines "injury" as "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent." Utah Code Ann. § 63-30-2(5).

Mr. Estes' suits under section 78-35-1 are not claims for "injury" as that term is defined in the Governmental Immunity Act. Instead, Mr. Estes seeks recovery of a fine or penalty imposed by the legislature on a class of public officials for specific category of wrongful conduct. The injury Mr. Estes complains of -- wrongful refusal to issue a writ of habeas corpus -- is not an injury to his person or property.[16] The fact that the statute imposes a fine of $5,000 regardless of individual circumstances demonstrates that the statute is not intended to compensate a plaintiff for personal injuries caused by wrongfully refusing to issue a writ.[17]

Requiring a notice of claim would not further the policy justifications for the notice-of-claim requirement. "[A] notice of claim provides the governmental unit with an

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[16] The fact that the statute defines "injury" by reference to conduct "that would be actionable if inflicted by a private person or his agent" is significant. No one other than a judge may violate section 78-35-1 and, consequently, the conduct would not "be actionable if inflicted by a private person . . . ." Utah Code Ann. § 63-30-2(5).

[17] If the Governmental Immunity Act were found to apply to claims under section 78-35-1, then it would logically apply to any action brought against a government official to require that official's compliance with the law.

opportunity to promptly investigate and to remedy any defect immediately, before additional injury is caused; it helps avoid unnecessary litigation; it minimizes difficulties that might arise from changes in administrations." Sears v. Southworth, 563 P.2d 192, 193 (Utah 1977). Providing notice of a violation of section 78-35-1 would not further any of these goals because the harm cannot be remedied, nor can the fine be imposed, without further action by a court. The violation is complete and uncorrectable when made and cannot be remedied, either for the petitioner effected or anyone else, by any amount of investigation the Attorney General or the Administrative Office of the Courts. The district courts incorrectly ruled that Mr. Estes' claims were barred by the notice requirements of the Utah Governmental Immunity Act.

II. THE DISTRICT COURTS IMPROPERLY RULED THAT MR. ESTES' CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

In each of the consolidated cases, the district courts also dismissed Mr. Estes' complaints on the ground that they were barred by the statute of limitations. [Tibbs R. 179-80; Rigtrup R. 173-74; Sawaya R. 185-87]. Mr. Estes filed his complaints against Judges Tibbs and Rigtrup in July 1996, and he filed his action against Judge Sawaya in August 1996. [Tibbs R. 1-3; Rigtrup R. 1-3; Sawaya R. 1-2]. The conduct giving rise to the claim against Judge Tibbs' occurred in late 1991 and early 1992. [Tibbs R. 1-3]. The conduct giving rise to the claim against Judge Rigtrup occurred in April 1990 [Rigtrup R. 43-46], and the conduct giving rise to the claim against Judge Sawaya occurred in July 1990 [Sawaya R. 47-48]. The Judges have argued, and Mr. Estes agrees, that his claims

are subject to the one-year statute of limitations contained in section 78-12-29.[18]

The district courts, however, failed to address Mr. Estes' argument that the limitations period should be tolled. Mr. Estes argued below that the limitations period should have been tolled during the time he was incarcerated. In addition, the limitations period should have been tolled during the pendency of an action filed by Mr. Estes in federal court raising similar issues against these defendants. Both of these issues raise factual questions that preclude summary judgment and which cannot be resolved on the basis of the record before this Court.

This Court may affirm the district courts grant of summary judgment only if there are no disputed issues of material fact, and the Court concludes that the Judges are entitled to judgment as a matter of law. See Utah R. Civ. P. 56; In re West, 948 P.2d 351 (Utah 1997). In reviewing the grant of summary judgment, the Court must view all facts in the light most favorable to Mr. Estes. Hipwell v. IHC Hosp., 944 P.2d 327, 328 (Utah 1997). In the proceedings below, the Judges failed to address the factual and legal argument made by Mr. Estes concerning tolling the statute of limitations, and offered no evidence on the subject. Similarly, the district courts did not make any findings or rule

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[18] This concession by the Judges bolsters the arguments set forth in Part I above regarding the inapplicability of the Government Immunity Act's notice provisions to these claims -- the Judges agree that Mr. Estes' claim is "[a]n action . . . upon a statute for a penalty or forfeiture," Utah Code Ann. § 78-12-29(2), and therefore not an action for injury to person or property.

If, however, the one-year statute of limitations does not apply, Mr. Estes' claims would be governed by the residual four-year statute of limitations set forth in section 78-12-25(3) of the Utah Code. Regardless of which limitations period applies, however, factual questions regarding tolling of the statute of limitations preclude dismissal of Mr. Estes' claims.

directly on this issue.

This Court has recognized that a statute of limitations will be tolled in "exceptional circumstances where the application of the general rule would be 'irrational or unjust.'" See Sevy v. Security Title Co., 902 P.2d 629, 636 (Utah 1995). "'The ultimate determination of whether a case presents exceptional circumstances that render the application of a statute of limitations irrational or unjust' is a balancing test. The balancing test weighs the hardships imposed on the claimant by the application of the statute of limitations against any prejudice to the defendant resulting from the passage of time." Id. (quoting Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992)). Factors the Court considers include whether the defendant's problems caused by the passage of time are greater than the plaintiff's . . . whether the claim has aged to the point that witnesses cannot be located, evidence cannot be found, and the parties cannot remember basic events." Id. (citing Klinger v. Kightly, 791 P.2d 868, 869 (Utah 1990) and Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981)).

In this case, Mr. Estes argued below that the limitations period should have been tolled during the time he was in prison because, among other things, he lacked access to a lawyer or a legal library that would have permitted him to pursue his claims.[19] [Tibbs R. 151-52] Mr. Estes argued, in essence, that it would be "irrational or unjust" not to toll the statute of limitations. The balancing test supports this argument. The Judges will not

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[19] Prior to 1987, section 78-12-36 of the Utah Code provided that limitations period would be tolled during the period the plaintiff "was imprisoned on a criminal charge." See Utah Code Ann. § 78-12-36 (1987); see also Smith v. Cook, 803 P.2d 788, 790 (Utah Ct. App. 1990). In 1987, however, the legislature deleted this provision from section 78-12-36.

suffer any hardship if the statute is tolled because all of the relevant evidence is set forth in the various records of the proceedings and there are no witnesses to be located. Mr. Estes, on the other hand, would lose his cause of action if the statute were applied. He respectfully requests that this Court reverse the district courts' rulings on the statute of limitations issue or, alternatively, remand these cases to the district courts for more particularized findings on the balancing factors applicable to claims for equitable tolling.

III. THE DISTRICT COURTS IMPROPERLY RULED THAT MR. ESTES' CLAIMS WERE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

The district courts in the Rigtrup and Sawaya cases also dismissed Mr. Estes' claims on the ground that they were barred by the doctrine of collateral estoppel. [Rigtrup R. 173-74; Sawaya R. 185-87]. The district court in the Tibbs case declined to dismiss the complaint on this basis. [Tibbs R. 1-3]. The Judges argued that Mr. Estes had raised these claims in a civil conspiracy lawsuit he had previously filed in federal court. That lawsuit named the individual Judges as defendants, and was dismissed in 1995 for failing to state a claim upon which relief may be granted. A copy of Mr. Estes' complaint, and the Report and Recommendation by Magistrate Judge Samuel Alba, are included in the Addendum.[20]

Mr. Estes asserted, as part of his alleged civil conspiracy, the conduct of Judges Tibbs, Rigtrup, and Sawaya that gives rise to these cases. [Tibbs R. 79-80]. He did not, however, assert claims against any of them for violation of section 78-35-1. A party may

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[20] Magistrate Judge Samuel Alba's Report and Recommendation was adopted by Chief Judge David Winder, and Mr. Estes' complaint was dismissed on April 12, 1995.

be collaterally estopped from asserting a claim if the following conditions are met:

> First, the party must show that the issue challenged in the case at hand is identical to the issue decided in the previous action. Second, the issue in the previous action must have been decided in a final judgment on the merits. Third, the issue in the previous action must have been competently, fully, and fairly litigated. Fourth, the opposing party in the action at hand must have been either a party or privy to the previous action.

Sevy v. Security Title Co., 902 P.2d 629, 632 (Utah 1995) (emphasis added). Although it is undisputed that the second and fourth elements are satisfied, the other requirements have not been met. The issue decided in the federal action is not identical to the issue in the underlying cases. While the federal lawsuit was based upon the same factual predicate, it alleged claims for civil conspiracy in violation of the federal constitution and statutes. Mr. Estes did not assert a claim for violation of section 78-35-1, which is the sole claim raised in these cases. In addition, the issues were not competently, fully, and fairly litigated because the case was dismissed on motion before any discovery and Mr. Estes was representing himself, pro se, against numerous attorneys for the various defendants. The rulings by the district courts in the Rigtrup and Sawaya cases relying on the doctrine of collateral estoppel as a bar to Mr. Estes' claims are erroneous and should be reversed.

IV. MR. ESTES' COMPLAINTS STATED CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

The district courts in the Rigtrup and Sawaya cases also dismissed Mr. Estes' claims on the ground that they failed to state a claim upon which relief may be granted. [Rigtrup R. 173-74; Sawaya R. 185-87]. Again, the district court in the Tibbs case declined to dismiss the complaint on this basis. [Tibbs R. 1-3]. In each of the cases, the

Judges argued that their conduct was not "wrongful" or "willful" and therefore Mr. Estes had not stated a claim for relief under section 78-35-1. Mr. Estes contends there are factual issues which preclude entry of summary judgment, or dismissal on the basis of Rule 12(b)(6), and the cases should be remanded for trial. Specifically, Mr. Estes contends that each of the named defendants violated section 78-35-1 for the following reasons.

A. Estes v. Tibbs.

First, Judge Tibbs dismissed Mr. Estes' habeas petition on the ground that he had named as the sole defendant the acting warden of the Central Utah Correctional Facility who, he ruled, had not violated any of Mr. Estes' constitutional rights. Mr. Estes contends this ruling was incorrect[21] and violated section 78-35-1.

Second, following remand of this case from the court of appeals, Mr. Estes amended his writ to name the Utah Board of Pardons, but the district court notified him that it would not be accepted because the Sixth Circuit Court, where he originally filed his writ, no longer existed. Mr. Estes contends this conduct violates section 78-35-1.

Third, when Mr. Estes tried to file the amended writ in the Sixth District Court, the court refused to accept it without a filing fee or writ of impecuniosity. Mr. Estes contends this conduct violates section 78-35-1 because, among other things, he was attempting to amend his original writ (which was filed without a filing fee or writ of

---

[21] This ruling was affirmed by the Utah Court of Appeals on different grounds. The Utah Court of Appeals held that the warden was properly a party, but Mr. Estes also should have named as a defendant the Utah Board of Pardons. Estes v. Van Der Veur, 824 P.2d 1200, 1202 (Utah Ct. App. 1992).

IN THE UTAH SUPREME COURT

NEWTON ESTES, Plaintiff/Appellant V. JUDGE DON V. TIBBS, Defendant/Appellee.	Supreme Court Consolidated Case No. 970193
NEWTON ESTES, Plaintiff/Appellant, V. JUDGE KENNETH RIGTRUP, JUDGE JAMES SAWAYA, Defendants/Appellees.	CORRECTION TO PAGE 18 OF BRIEF OF APPELLANT

Newton C. Estes
372 E. 700 North
Kaysville, UT 84037
Telephone: (801)544-5253

In Coordination With

Court-Appointed Counsel
Todd M. Shaughnessy

Brent A. Burnett
Assistant Attorney General
160 E. 300 South
Heber M. Wells Building
Salt Lake City 84144

THE CORRECTION

[I, the Plaintiff Newton Estes, believes this correction should be made prior to the AG's response; whereas my counsel believes it could just as well come after.]

Delete under A. Estes v. Tibbs:

> "First, Judge Tibbs dismissed Mr. Estes' habeas corpus petition on the ground that he had named as the sole defendant the acting warden of the Utah Correctional Facility who, he ruled, had not violated any of Mr. Estes' constitutional rights."

Instead, make it to read:

> "First, Judge Tibbs dismissed Mr. Estes' habeas petition on the sole ground that he had named as defendant the warden of the Central Utah Correctional Facility who, as he ruled in accordance with the AG's Argument, had not been alleged to have taken one action
>
> 'that would deprive Plaintiff of his constitutional rights or liberties. Indeed, the only connection between Plaintiff and Mr. Van Der Veur is the fact that Mr. Van Der Veur is the Warden of the prison where Plaintiff is housed.'"

The differences are important because saying "sole defendant" makes it seem Tibbs may have ruled there should have been an additional defendant. That could lend substance to what happened to my appeal,wherein the Court of Appeals in Estes v. Van Der Veur 824 P.2d 1201(1992), stated I had been properly dismissed in the "court below" on the ground I had failed to name the Board of Pardons as an additional defendant.

As quoted above, no such suggestion had ever been made by Judge Tibbs (or the Attorney General) in the court below.

DATED this 28th day of April, 1998.

By Newton C. Estes
Newton C. Estes

CERTIFICATE OF SERVICE: I hereby certify that on this 28th day of April, 1998, I mailed a copy of the foregoing Correction to Page 18 to Assistant AG Brent A. Burnett, 160 E. 300 South, Salt Lake City 84144.

Newton C. Estes
Newton C. Estes

impecuniosity) and because section 21-7-2(2)(c) of the Utah Code states that no filing fees may be charged "in cases of habeas corpus . . . ."

B. Estes v. Rigtrup.

Judge Rigtrup denied Mr. Estes' writ of habeas corpus and, during the hearing on that writ, stated "[t]his Court cannot correct another district judge, or second guess him, because of his judgement exercised in sentencing." [Rigtrup. R. 1-2]. Mr. Estes contends this comment, combined with the denial of his writ, violates section 78-35-1.

Judge Rigtrup also refused to accept the evidence offered by Mr. Estes of "unusual circumstances" justifying an exception to the general rule regarding issues that may be raised in postconviction proceedings. He maintains that this is violates section 78-35-1.

C. Estes v. Sawaya.

Following the dismissal by Judge Rigtrup, Mr. Estes filed a habeas petition in Third District Court that was assigned to Judge Sawaya. The State filed and briefed a motion to dismiss, and the district court, relying on Rule 4-501 of the Utah Code of Judicial Administration, dismissed the petition on the grounds that Mr. Estes had failed to demonstrate why this issue had not been previously raised. Mr. Estes contends that Judge Sawaya's dismissal violated section 78-35-1 because Rule 4-501 expressly states that it "does not apply to petitions for habeas corpus or other forms of extraordinary relief. Utah Code Jud. Admin. Rule 4-501, Applicability.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the orders entered by the district courts in each of these consolidated cases be reversed, and that the cases be remanded for trials on the merits.

DATED this 20th day of April, 1998.

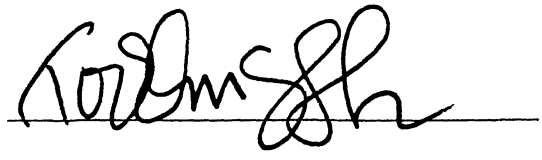
SNELL & WILMER

By _____
Todd M. Shaughnessy
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 1998, I caused a true and correct copy of the within and foregoing BRIEF OF APPELLANT to be sent to the following, via United States Mail, postage prepaid:

Brent A. Burnett
Assistant Attorney General
160 East 300 South
Heber Wells Bldg.
Salt Lake City, Utah 84144



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ADDENDUM

Estes v. Tibbs, Order of Dismissal

Estes v. Rigtrup, Order of Dismissal

Estes v. Sawaya, Order of Dismissal

Estes v. Tibbs, Notice of Appeal

Estes v. Rigtrup, Notice of Appeal

Estes v. Sawaya, Notice of Appeal

Estes v. Namba, et al, Amended Complaint of Conspiracy to Deny Civil Rights

Estes v. Namba, et al, Report and Recommendation

JOHN P. SOLTIS - 3040
Assistant Attorney General
JAN GRAHAM - 1231
Attorney General
Attorney for Defendant
Judge Don V. Tibbs
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR

SANPETE COUNTY, STATE OF UTAH

NEWTON C. ESTES,	:	**ORDER**
Plaintiff,	:	
vs.	:	Civil No. 960601239
JUDGE DON V. TIBBS,	:	Judge Kay L. McIff
Defendants.	:	

This matter came on regularly for hearing on the 19th day of February, 1997 at 11:00 a.m. before the Honorable Kay L. McIff, Judge of the above entitled court on the Defendant's Motion to Dismiss With Prejudice. The plaintiff Newton C. Estes was personally present and appeared pro se. The defendant was represented by Assistant Attorney General John P. Soltis. The Court reviewed all pleadings, memorandum and exhibits on file, heard oral argument and being fully advised in the premises now makes and enters the following Order:

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalties ($15,000) for THREE 78-35-1 Violations is dismissed with prejudice for failure to comply with the Governmental Immunity Act, Utah

Code Ann. §§63-30-11, -12 and plaintiff's civil action is jurisdictionally barred;

2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalties ($15,000) for THREE 78-35-1 Violations is dismissed with prejudice for failure to comply with the statute of limitations pursuant to the Judicial Code, Utah Code Ann. §§78-12-25 -29 and plaintiff's civil action is jurisdictionally barred;

DATED this 5th day of March, 1997.

BY THE COURT

JUDGE KAY L. McIFF

MAILING CERTIFICATE

This is to certify that I mailed a true and correct copy of the foregoing **ORDER**, this 21st day of February, 1997, to the following:

Newton C. Estes
372 East 700 North
Kaysville, UT 84037
(801) 544-5253

Debbie Briggs

JOHN P. SOLTIS - 3040
Assistant Attorney General
JAN GRAHAM - 1231
Attorney General
Attorney for Defendant
Judge James Kenneth Rigtrup
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

NEWTON C. ESTES, Plaintiff Pro Se, vs. JUDGE KENNETH RIGTRUP, Defendant.	**ORDER** Civil No. 960905255 CV Judge Robert K. Hilder

This matter came on regularly for hearing on the 12th day of February, 1997 at 8:00 a.m. before the Honorable Robert K. Hilder, Judge of the above entitled court on the Defendant's Motion to Dismiss With Prejudice. The plaintiff Newton C. Estes was personally present and appeared pro se. The defendant was represented by Assistant Attorney General John P. Soltis. The Court reviewed all pleadings, memorandum and exhibits on file, heard oral argument and being fully advised in the premises now makes and enters the following Order:

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalty ($5,000) for 78-35-1 Violation is dismissed with prejudice for failure to comply with the Governmental Immunity Act, Utah Code Ann. §§63-30-11, -12 and plaintiff's civil action is jurisdictionally barred;

2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalty ($5,000) for 78-35-1 Violation is dismissed with prejudice for failure to comply with the statute of limitations pursuant to the Judicial Code, Utah Code Ann. §§78-12-25 -29 and plaintiff's civil action is jurisdictionally barred;

3. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalty ($5,000) for 78-35-1 Violation is dismissed with prejudice by the doctrine of collateral estoppel; and

4. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalty ($5,000) for 78-35-1 Violation is dismissed with prejudice for failure to state a claim upon which relief can be granted.

DATED this 28th day of February, 1997.

BY THE COURT

JUDGE ROBERT K. HILDER

MAILING CERTIFICATE

This is to certify that I mailed a true and correct copy of the foregoing **ORDER**, this 12th day of February, 1997, to the following:

Newton C. Estes
372 East 700 North
Kaysville, UT 84037
(801) 544-5253

Debbie Briggs

JOHN P. SOLTIS - 3040
Assistant Attorney General
JAN GRAHAM - 1231
Attorney General
Attorney for Defendant
Judge James S. Sawaya
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

NEWTON C. ESTES,

Plaintiff,

vs.

JUDGE JAMES S. SAWAYA,

Defendant.

ORDER

Civil No. 960905955 CV

Judge Robert K. Hilder

This matter came on regularly for hearing on the 12th day of February, 1997 at 8:00 a.m. before the Honorable Robert K. Hilder, Judge of the above entitled court on the Defendant's Motion to Dismiss With Prejudice. The plaintiff Newton C. Estes was personally present and appeared pro se. The defendant was represented by Assistant Attorney General John P. Soltis. The Court reviewed all pleadings, memorandum and exhibits on file, heard oral argument and being fully advised in the premises now makes and enters the following Order:

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalty ($5,000) for 78-35-1 Violation is dismissed with prejudice for failure to comply with the Governmental Immunity Act, Utah Code Ann. §§63-30-11, -12 and plaintiff's civil action is jurisdictionally barred;

2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalty ($5,000) for 78-35-1 Violation is dismissed with prejudice for failure to comply with the statute of limitations pursuant to the Judicial Code, Utah Code Ann. §§78-12-25 -29 and plaintiff's civil action is jurisdictionally barred;

3. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalty ($5,000) for 78-35-1 Violation is dismissed with prejudice by the doctrine of collateral estoppel; and

4. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Petition for Recovery of Monetary Penalty ($5,000) for 78-35-1 Violation is dismissed with prejudice for failure to state a claim upon which relief can be granted.

DATED this 28th day of February, 1997.

BY THE COURT

JUDGE ROBERT K. HILDER

MAILING CERTIFICATE

This is to certify that I mailed a true and correct copy of the foregoing **ORDER**, this 12th day of February, 1997, to the following:

Newton C. Estes
372 East 700 North
Kaysville, UT 84037
(801) 544-5253

Debbie Briggs

Newton C. Estes
372 East 700 North
Kaysville, Ut 84037
Tel: 801/544-5253

IN THE SIXTH DISTRICT COURT OF UTAH

NEWTON C. ESTES, Plaintiff Pro Se, -vs- JUDGE DON V. TIBBS, Defendant.	NOTICE OF APPEAL Civil No. 960601239 Judge Kay L. McIff

I hereby file this Notice of Appeal to the Utah Supreme Court of Judge McIff's March 5, 1997 Order of Dismissal with Prejudice of my Petition For Recovery of Monetary Penalties ($15,000) For Three 78-35-1 Violations.

Affidavit of impecuniosity attached.

Newton C. Estes
Newton C. Estes
March 17, 1997

Certificate of Mailing: I hereby certify that on this 17th day of March, 1997, I mailed a copy of the above Notice of Appeal to defendant's defense counsel and assistant attorney general, John P. Soltis at P.O. Box 140856, Salt Lake City 84114.

Newton C. Estes
Newton C. Estes

Newton C. estes
372 East 700 North
Kaysville, UT 84037

IN THE THIRD DISTRICT COURT OF UTAH

NEWTON C. ESTES, Plaintiff Pro Se, -vs- JUDGE KENNETH RIGTRUP and JUDGE JAMES SAWAYA, Defendants.	NOTICE OF APPEAL[S] Case Nos. ~~960905255~~ 960905955 Judge Robert K. Hilder

I hereby file this Notice of Appeal[s] to the Utah Supreme Court of Judge Hilder's February 28, 1997 Orders of Dismissal of my Petition[s] for Recovery of Monetary Penalty ($5,000) For 78-35-1 Violation[s] against the two judges captioned above.

Affidavit of impecuniosity attached.

Newton C. Estes
Newton C. Estes
March 17, 1997

Certificate of Mailing: I hereby certify that on this 17th day of March, 1997, I mailed a copy of this Notice of Appeal to defendants' defense counsel and assistant attorney general, John P. Soltis at P.O. Box 140856, Salt Lake City 84114.

Newton C. Estes
Newton C. Estes

Newton C. estes
372 East 700 North
Kaysville, UT 84037

IN THE THIRD DISTRICT COURT OF UTAH

NEWTON C. ESTES, Plaintiff Pro Se, -vs- JUDGE KENNETH RIGTRUP and JUDGE JAMES SAWAYA, Defendants.	NOTICE OF APPEAL[S] Case Nos. 960905255 960905955 Judge Robert K. Hilder

I hereby file this Notice of Appeal[s] to the Utah Supreme Court of Judge Hilder's February 28, 1997 Orders of Dismissal of my Petition[s] for Recovery of Monetary Penalty ($5,000) For 78-35-1 Violation[s] against the two judges captioned above.

Affidavit of impecuniosity attached.

Newton C. Estes

Newton C. Estes
March 17, 1997

Certificate of Mailing: I hereby certify that on this 17th day of March, 1997, I mailed a copy of this Notice of Appeal to defendants' defense counsel and assistant attorney general, John P. Soltis at P.O. Box 140856, Salt Lake City 84114.

Newton C. Estes

Newton C. Estes

Newton C. Estes
372 East 700 North
Kaysville, UT 84037
Ph: 544-5253

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NEWTON C. ESTES,

Plaintiff, Pro Se

vs.

25 CONSPIRATORS IN APPROXIMATE CHRONOLOGICAL ORDER OF THEIR PARTICIPATION:

AMENDED

COMPLAINT OF CONSPIRACY

TO DENY CIVIL RIGHTS

Case No. 94-NC-089

1) BRIAN NAMBA, Davis County prosecutor; 2) STEVE VANDERLINDEN, defense attorney and public defender; 3) JUDY VALEIKA, AP&P investigator; 4) Judge DOUGLAS CORNABY: 5) JAY EDMONDS, appeal attorney; 6) DAN LARSEN, Assistant AG; 7) Judge KENNETH RIGTRUP; 8) Judge JAMES SAWAYA: 9) CRAIG LUDWIG, Third District Court Clerk; 10) Federal Judge DAVID SAM; 11) ANGELA MICKLOS, Assistant AG; 12) GARY DeLAND, past Corrections director; 13) LANE McCOTTER, Corrections director; 14) ELDON BARNES, former Draper warden; 15) FRED VAN DER VEUR, Gunnison warden; 16) PETE HAUN, former Parole Board chairman; 17) MICHAEL SIBBETT, Parole Board chairman; 18) LORENZO MILLER, Assistant AG; 19) Judge DON TIBBS; 20) KIRK TORGENSEN, Assistant AG; 21) Judge MICHAEL J. MURPHY; Presiding 22) Judge JOHN WAHLQUIST; 23) DAVID CARLSON, Assistant AG; 24) DEAN W. SHEFFIELD, Judicial Conduct Commission; 25) P. GARY FERRERO, Utah State Bar,

Defendants.

INTRODUCTION

This complaint is about a conspiracy to nullify plea bargains by suspending habeas corpus review of courtroom victims receiving original-charge punishments through the use of false secret information by the sentencing judge and parole board. The purpose is to achieve the same result without the cost of a trial.

JURISDICTION

This action arises under the Constitution of the United States, plus the First, Fifth, Sixth and Fourteenth Amendments to it, as well as Title 42 United States Code Section 1883, 42 USC 1985, 42 USC 1986, 28 USC 1331, 18 USC 241 &242 and the 1871 Civil Rights Enforcement Act.

Title 28 USC 1343 confers jurisdiction upon this Court to conduct the trial.

Plaintiff, Newton C. Estes, is a citizen of the United States of America and a resident of Kaysville, Davis County in the State of Utah.

Defendants, at the time material to this action, were duly elected, appointed, or otherwise employed by this State or the U.S. government. Accordingly, all actions complained of were undertaken under color of state law or under the authority of the United States.

NOTE: IF THE COURT SHOULD DETERMINE MY RESEARCH AND EXPERIENCE AS A VICTIM QUALIFIES ME AS ONE WHO WILL BE ABLE TO ADEQUATELY PROTECT THE INTERESTS OF A CLASS OF A POSSIBLE 1000 OTHER VICTIMS, I NOW SUGGEST CONVERTING THIS TO A CLASS ACTION SUIT.

This conversion could be accompanied by a preliminary announcement that this Court would strictly adhere to the same requirements of leniency the law

has imposed upon it in individual pro se civil rights complaints. Specifically, that causes of action are to be accorded reasonable intent so that close calls will always be decided in favor of the pleader, and that timely notice of any serious deficiencies will enable me to amend effectively.

1) BRIAN NAMBA, Davis County prosecutor, at Davis County Court Complex, 800 West State Street, Farmington, UT, started his participation in the conspiracy to nullify plea bargains at my January 1988 arraignment in the circuit court in Layton when, after I had asked him to recommend an attorney, he named Steve Vanderlinden. I had believed he would of course name one who would adhere to the mechanics of due process so that coming events would not be tainted.

a) Instead, he named one whom he knew had been involved in an 18-year conspiracy to keep defendants from ever getting the due process of 6th Amendment hearings to challenge lies called out by the judge from documents Vanderlinden either never presented or did not examine with them.

b) Furthermore, upon information and belief, he as prosecutor was the due course author of the frame-up June 21, 1988 affidavit in case D.C. #1-5983 admitting to the original charges Vanderlinden had tried to get me to sign--thus conspiring to violate my 5th Amendment right against self-incrimination.

In addition to violating the Constitution, the above conduct also violates Utah's canon of ethics' "duty to uphold legal process...[and being a factor] in preserving government under law..." The law involving tested-for-accuracy presentence reports is embodied in the Lipsey, Casarez and Howell decisions.

Discovery will determine how many defendants prosecuted by Namba and defended by Vanderlinden got to examine their PSI reports for accuracy.

I will put in evidence the original-charge affidavit Vanderlinden tried to get me to sign whose authorship will be derermined at trial, or by the defendant's

sworn answer to this complaint that prosecutors never prepare the words and intent of plea bargain affidavits.

My ACTUAL INJURY was 5 years in prison for which I ask the Court and jury to require Namba to pay me a proportional $25,000 for having thus deliberately conspired to cripple, rather than uphold legal process. Punitive damages will depend on his testimony.

2) STEVE VANDERLINDEN, defense attorney and public defender who lived at 3208 S. North Canyon Circle in Bountiful, UT, participated in the conspiracy described above by:

a) trying to trick me into pleading guilty to the original charges as contained in an affidavit dated June 21, 1988.

b) after that had failed when I discovered the deception and demanded the words be changed, he set out to deprive me of my 5th and 6th Amendment rights not to be punished without due process of law and confronting my accusers extended to all by the 14th Amendment by failing to obtain my presentence report available to him the previous Friday, July 15 until 20 minutes before the scheduled 9 AM Tues. sentencing. This allowed totally insufficient time to locate and challenge the lies I discovered in its many pages (PSI reporter Judy Valeika said it was the largest ever prepared in Davis County) after the Utah Supreme Court finally arranged for me to be provided a copy.

c) After not having turned one page or read one sentence while me and my daughter were calling out the lies we had time to see, and after hearing me tell Judge Cornaby it was full of lies, he deprived me my 6th Amendment right to confront my accusers by not demanding (or even suggesting) such a hearing. Thus his conspiring to deny me the equal protection of the Lipsey-Casarez-Howell caused me to get sentenced as a dangerous repeat offender who had another neighborhood victim.

d) His final act in conspiring to deny me due process of law was a criminal one needing investigation by the U.S. Attorney: he committed outright perjury in federal court on November 17, 1992 at my habeas hearing of case #90-C-668-S by stating PSI reports are never available till just before sentencing, whereas the truth is they are available 3 days ahead of time. He committed additional perjury when he said my fear of media exposure had caused me to request he allow evidence against me to be illegally given to the judge in chambers (without me even knowing its content).

The evidence I will be able to offer the jury is: (a) the bogus affidavit of original charges I refused to sign which I retreived from Vanderlinden's office wastebasket; (b) Judge Cornaby's Sept. 27, 1988 transcribed certificate of probable cause statement that PSI reports become available 3 days before sentencing, plus the cover page of mine showing such was the case with my report; (c) eleven handwritten pages of lies I sent Jay Edmonds to use in my appeal which I discovered only after I was in prison and had time to read the gigantic PSI report, and the transcript of my sentencing hearing where I told the judge it was full of lies. My step-daughter, Margaret Erickson will testify that only she and I, not Vanderlinden, performed any examination of the report and that as we commented on the lies we did see, he uttered not one word; (d) his perjury will be shown in the transcript of his statements at my November 17, 1992 habeas hearing before Magistrate Boyce and a July 12, 1988 statement I had prepared to read to Judge Cornaby about I wanted everything against me presented in <u>open court</u>. I never got to go in chambers and present it, however, because, after calling me at work to rush up to Farmington to "prevent Namba from presenting the <u>Playboys</u>", he went into chambers without me and thereby let Namba present secret-from-me maximum sentence recommendation and notice of intent to use hearsay at sentencing which listed how search warrant evidence showed my criminal mind set.

Solid evidence of my version of that July 12 fiasco is that Namba concluded my showing the victim a book called Monster Rally showed I wanted the victim to be exposed to aberrations such as devil worship in order to break down parental relationships. Had I ever seen his documents, I would not have let the judge use those same words to sentence me when that book is considered the classic work by America's best loved cartoonist, Charles Addams. The whole book came from the pages of the New Yorker.

My ACTUAL INJURY at the hands of Mr. Vanderlinden was 5 years in prison for which I ask the Court and jury to hold him at least three fifths responsible for 60 months at $3500—or $126,000.

In the belief that I should be awarded something in the ballpark of $5 million PUNITIVE DAMAGES, I pray that this defendant be held liable for at least 6% of the grand total—or $300,000.

The CLASS ACTION aspect would be to discover which past or present plea bargain inmates never got to study their possibly damaging PSI reports, and identify their lawyers.

3) JUDY VALEIKA, AP&P investigator/reporter who works at 99 S. Main in Farmington, similarly conspired to deny me my 5th, 6th and 14th Amendment rights to the due process of confronting accusers or examining her other information to the court by:

a) telling me the accused are never allowed to examine their PSI reports. That lie paved the way for her to solicit and report rumors to the judge and totally unconfirmed reports there had been another neightborhood victim.

b) It also enabled her to tell me she had been unable to discover any underlying cause for which I could qualify for outpatient treatment (as recommended by Dr. Roby, I later found out). She consequently told me that, unless I could come up with another instance of child molestation, she would have to

report that my act had been inexcusably willful. Accordingly, I invented such an instance. Judge Cornaby, however, used it to call me a repeat offender and put me in prison instead of using it to justify the suspended sentence or probation my age, clean past and crime would warrant.

Thus her conspiracy with the judge and my lawyer prevented my getting the equal protection of Lipsy-Howell-Casarez case law that I be able to challenge her accuracy and fairness. Illustrative was her fraudulent aggravating circumstance #10 and omission of all mitigating including obvious #9, 10 and 11.

Circumstantial evidence of the above conspiracy and lending solid credence to my version of the events would be to discover if her other clients were also told they could not see their PSI reports. (claim a). Additionally, calling as witness the interviewees of my report can be expected to show rumors and exaggerations were actually solicited by telling them I would never get to see what they said.

b) My complete AP&P file (not the report) should come in under discovery to search for any internal notes about how it was a problem that Dr. Roby believed incarceration was uncalled for.

My ACTUAL INJURY at Ms. Valeika's hands was 5 years in prison for which I ask the Court and jury to hold her one tenth responsible--or 6 months at $3500 for a claim of $21,000. I further pray for a 3% PUNITIVE liability of $150,000.

The CLASS ACTION aspect would be to ask all present and past inmates if their PSI reporters told them they could not see their reports and if the contents may have hurt them.

4) JUDGE DOUGLAS CORNABY, former 2nd District Court judge who now lives at 3612 N 2900 E, Layton, UT, similarly conspired to deny me equal protection of Lipsey-Howell-Casarez case law requiring to be based on information checked for accuracy by defendant when he ridiculed my courtroom claims of PSI report

lies and false rumors and said I only wanted to confront those accusers so I could use my domineering abilities and get them to change their stories. This enabled him to sentence me as a high risk offender with deep-seated sexual problems, using the unseen PSI report lie of another neighborhood victim and my Valeika-solicited invention of an event 39 years previous.

The transcript of the July 19, 1988 sentencing hearing is the proof I will be offering the jury. Also a 5/31/88 letter to him about finding rumor sources.

My ACTUAL INJURY was 5 years in prison for which I ask the Court and jury to hold Judge Cornaby at least three tenths responsible—or 18 months at $3500 for a claim of $63,000. I further pray for a 6% PUNITIVE liability of $300,000.

The CLASS ACTION aspect would be to discover which plea bargain inmates heard their judge refer to damaging challengeable information without ever being asked by the judge if they had examined the PSI report.

5) Appeal attorney JAY EDMONDS who resides at 1660 Orchard Drive in Salt Lake City participated in the conspiracy to have plea bargainers sentenced to original charge punishments through the use of false secret information by refusing to appeal Steve Vanderlinden's causing that to have happened to me. His guilt, however, would be contingent upon discovering if he has appeared in courtrooms as defense attorney and if he regularly prevented his clients from examining their presentence reports. (He also refused my written request that the AG's response be answered.)

In that event, I would introduce the eleven pages of PSI report lies and inaccuracies I sent him from prison and ask him to tell the jury if he had any other explanation why he had decided Vanderlinden's allowing all this to go to Judge Cornaby unchallenged,and thus used to deny me a punishment fitting my crime, was unworthy of being appealed.

My ACTUAL INJURY in this claim can not be calculated by months, so I ask

for an arbitrary one-year compensatory liability of $42,000. No PUNITIVE.

6) DAN R. LARSEN, Assistant Attorney General who works at AG headquarters at 236 State Capitol, Salt Lake City, is heavily involved in the conspiracy to have plea bargainers get the same punishment as if found guilty by a jury on the original charges because of his part in the courtroom conspiracy to suspend prisoners' basic First Amendment right to obtain redress through the absolute right to use habeas corpus to challenge and correct judges' unconstitutional actions at sentencing.

a) He admitted at the dismissal hearing of my Third District Court habeas petition #900901219 that "there is no relief for Constitutional violations in the State of Utah".

b) He next demonstrated how he has been able to bring about this unprecedented suspension when, in my next habeas application #900903466, he conspired with Judge Sawaya to use UCJA Rule 4-501 to dismiss my petition illegally.

My proof of item (a) will be Carlton Way's transcript of that hearing; and for (b) it will be the submission of the court's Minute Entry granting Mr. Larsen's motion, and reading the rule itself forbidding its use in a habeas corpus.

My ACTUAL INJURY caused by his illegal action and his violating his canon of ethics to live up to his "duty to uphold legal process [and] in preserving government under law..." was the resulting 37 months of incarceration at $3500--or $129,500. I further pray for a 6% PUNITIVE liability of $300,000.

The CLASS ACTION aspect would be to discover how many times this rule has been so used on Utah prisoners and who the conspirators were.

7) JUDGE KENNETH RIGTRUP participated in the conspiracy to suspend habeas corpus by: (a) admitting he does not allow his court to be used for habeas corpus review and correction of constitutional violations by fellow judges during their sentencing hearings, and (b) by saying that an appeal attorney's refusal to appeal

Vanderlinden's ineffectiveness (maybe because he was very effective for the prosecution?) was no excuse for my not having done so, thus rendering that issue not eligible for habeas corpus.

I will offer absolute proof of the above when I read from Carlton Way's transcript of the above proceeding.

My ACTUAL INJURY from the above outrageous supposedly judicial behavior (it violates Judicial Canon 3 B.(7) mandating my "full right to be heard according to law.") was 40 months in prison at $3500--or $140,000. I further pray for a PUNITIVE liability of 6% of the $5 million dollars--or $300,000. (3/31/90 dismissal--7/28/93 parole)

8) JUDGE JAMES SAWAYA, as mentioned above in Defendant #6, conspired with that Asst. AG to illegally use UCJA 4-501 to dismiss my habeas petition. This denial of my 1st Amendment of access to legal redress for having been punished without due process not only violated Canon 3 B.(7)(8) of his code of ethics by denying my right to be heard and unfairly (illegally!) disposing of my judicial matter, but became criminally punishable under statute 78-35-1 for wrongful refusal to allow a habeas corpus.

Need I mention that proof is obviously to be found in his Minute Entry of dismissal and then reading for the jury UCJA 4-501's saying it may not be so used?

My ACTUAL INJURY form the above illegal acts was 37 months in prison at $3500--or $129,500. I further pray for a 5% liability of the PUNITIVE damages of $5 million I am suggesting as a just punishment for these constitution-destroying conspirators--or $250,000. (37 months was from 7/7/90 dismissal to 8/93 parole)

The CLASS ACTION aspect would be to see which judges did this to how many prison inmates.

9) CRAIG LUDWIG, Third District Court Clerk, also acting under color state law, compromised my 5th Amendment right to due process by not mailing me notifi-

cation of either of Dan Larsen's two dismissal hearings that took place before Judge Rigtrup in case # 900901219. Proof will consist of Clerk Ludwig's expected inability to produce copies of any such notification.

The CLASS ACTION aspect would be to discover how many prisoners in Utah have thus been hustled up to court without knowing about it ahead of time or what the action would be about, and upon whose instructions this situation exists.

My ACTUAL INJURY was 40 months in prison after the 3/31/90 dismissal for which I hold Mr. Ludwig at least 10% responsible for a liability of $14,000. No PUNITIVE.

10) FEDERAL JUDGE DAVID SAM has undertaken a crucial dual role in the conspiracy to suspend habeas corpus review of unconstitutional and illegal sentencing thus making him liable for damages under 18 USC 242 as determined by this Court proceeding under 28 USC 1343 and 1331.

In order to cripple inmates exercising their 1st Amendment right to gain redress, he dismissed my Bounds v Smith-based 42 USC 1983 civil rights complaint #92-C-223 of the prison denying prisoners both a law library or contract legal assistance. Also endorsed was the prison's denying typewriters and copy machines.

His method of dismissing violated my 5th Amendment right to due process, my 1st Amendment right of redress of grievances, and the 14th Amendment's extension of them to all Americans:

a) First, he violated his own court rules by not allowing the Dept. of Corrections defendants to even learn they were being sued by never permitting the summonses to be served. PROOF will be the jury hearing Clerk Zimmer's response that Judge Sam had not allowed him to serve summonses, and FRCP Rule 4(c)(2) saying that the judge must arrange for such service when the applicant has been granted in forma pauperis. Or the old Rule 4 (c)(2)(B)(i).

b) He next withdrew the case from being preliminarily reviewed and reported on by the magistrate so he could personally enter the case as defense counsel! In further denial of due process and equal protection of the rules, he spent 85 days to frame an answer for the defendants which he used as grounds for dismissal. In essence that answer has the effect of repealing the use of 42 USC 1983 civil rights complaints by all citizens of the United States.

PROOF of his illegally bypassing the magistrate will be letting the jury hear Rule of the Federal Rules of Civil Procedure. A comparison of his defendant-answer/dismissal-order wording with the actual words of 42 USC 1983 will let a jury determine if I was given equal protection of that law, and how such actions comport with his performance of duties as set forth in Canon 3(B)(7) and (8) of his code of ethics.

c) His next performance in the conspiracy to suspend habeas corpus was to accept his magistrate's recommendation for dismissal although it was based on Vanderlinden's perjury in Boyce's courtroom and a rejection and a rejection of obviously truthful testimony of both me and my step-daughter (the AG dared not cross-examine either one of us). Magistrate Boyce had no way to know for sure Vanderlinden was committing perjury although he heard me make that accusation.

However, when I finally saw his Report and Recommendation was based almost exclusively on the perjuror's testimony, I submitted my official Objections which contained incontrovertible proof of that perjury. But Judge Sam decided that perjury is a perfectly acceptable basis for dismissing a habeas corpus complaint.

This is tantamount to a suspension of habeas corpus and makes Judge Sam subject to punishment under 28 USC 1331 for depriving me of due process and equal protection of rules governing federal habeas corpus.

PROOF will have the jury hear Vanderlinden's transcribed statement, then Judge Cornaby's transcribed remarks at my 9/27/88 probable cause hearing, plus

the cover sheet of my PSI report, and my Objections to Boyce's Report and Recommendation—all showing Judge Sam is willing to use perjury to carry out his part in the conspiracy.

d) The record will show that he believes anyone who objects to being sentenced on the PSI report's lying about there was another neighborhood victim is really only complaining about its "form and tenor".

e) The PROOF will further show that my motion to be appointed counsel at my 11/17/92 evidentiary hearing was overruled in deliberate direct violation of 28 USC 2254 Rule 8(c). That rule requires I be appointed counsel whether or not I request it.

My ACTUAL INJURY from his 4/27/93 dismissal was 3 months in prison at $3500, plus a 14-month deprivation (from 5/7/92) of prison-supplied legal assistance at an arbitrary $1000—totalling to $24,500, I further pray for an 8% liability of my suggested $5 million PUNITIVE damages—or $400,000.

11) ANGELA MICKLOS, Assistant AG, participated in the conspiracy to suspend habeas corpus with her Answer to my R&R Objections wherein I had proved the report was based on perjury. She said such an objection was no reason not to adopt the magistrate's report. Any law official not involved in the conspiracy would have instituted action to bring charges against the perjuror. Also thus violated was her responsibility to observe the Rules of Professional Conduct requiring her to be a force in "preserving government under law [and] to uphold legal process."

My ACTUAL INJURY for her April 1993 urging the acceptance of perjury was three months in prison at $3500--or $10,500. I further pray for a PUNITIVE liability of 2%--or $100,000.

12) GARY DeLAND, former Corrections Director// 13) LANE McCOTTER, present Corrections Director// 14) ELDON BARNES, former Draper warden// 15) FRED VAN DER VEUR, Gunnison warden were all crucial participants in the conspiracy to create A SUSPENSION OF PRISONERS" Article I Section 9 Constitutional right to habeas corpus review of being in prison on false secret information. Their actions were thus designed to effectively curtail our First Amendment right to seek redress in the courts by denying us the 14th Amendment's equal protection of the law as promulgated by the Supreme Court in Bounds v Smith—namely that inmates must have available research tools as found in a law library, or the services of a contract attorney. Such is deemed necessary to file and then be able to effectively answer the attorney general's motions to dismiss.

a) To prevent this mandated assistance from becoming available to inmates, both directors, obviously acting under color of state law, selected the contract option, but drew it up in such a way as to render it virtually worthless in inmate habeas actions. That was to have it worded so the contract attorney is forbidden from offering anything beyond the initial filing, thus guaranteeing automatic dismissal.

PROOF will consist of letting the jury hear the Legal Assistance described under Scope of Services in the contract attorneys' agreement with the Department of Corrections.

b) The two wardens were enlisted to aid in this conspiracy, probably by the Attorney General. Their assignment was to assure that any "jailhouse lawyer" work would not be submitted in workmanlike fashion by denying inmates access to typewriters or copy machines. At Gunnison, for instance, Van Der Veur decreed that typewriters would be available for anything other than legal typing, and that any legal documents needing copying would need a written request to the contract attorney for him to copy on his next weekly or semi-weekly visit, during which

wait responses could become overdue. I believe the illegal habeas-buster UCJA 4-501 allows only five days.

My PROOF will be to rely initially on the wardens not committing perjury. Should there be any denials, I will ask for a list of prison employees so those who implemented the policies can be identified and questioned during discovery.

c) Mr. Van der Veur even distributed a notice that the contract attorney would henceforth not be able to even file habeas petitions based on the Foote decision which mandated the Parole Board hold due process hearings. Since that past deprivation was known to be still happening to every parole applicant, the miniscule contract would need huge augmentation to handle the expected flood. Evidently Mr. McCotter refused to re-negotiate.

PROOF will be the contract attorney producing the notice itself, and his request the warden notify the inmates, and the absence of any perjury that the warden had not done so.

My ACTUAL INJURIES are $30,000 from Gary DeLand for my first 30 months of denial of legal assistance at an arbitrary $1000 pr month; #30,000 for a similar denial from Lane McCotter for my last 30 months; $500 per month for 28 months of typewriter denial from Eldon Barnes for a claim of $14,000; and $16,000 for 32 months of typewriter and copy machine denial from Fred Van Der Veur.

PUNITIVE may not be justified because they were probably following the advice of the attorney General.

The CLASS ACTION aspect would be to discover which inmates were denied, and by whom, professional help, typewriters and copy machines, to be able to answer effectively the AG's automatic dismissal motions.

16) PETE HAUN, former Parole Board Chairman// 17) MICHAEL SIBBETT, former member and present chairman, were crucial contributors in the conspiracy to have plea bargain inmates serve original-charge punishments. This will be ill-

ustrated by examining their methods in conducting their parole hearings.

a) After the Supreme Court said in its Foote decision that the Board's hearings would henceforth have to grant equivalent due process to that of a typical trial/sentencing court because in Utah, the Board, not the court, determines the actual length of sentences— both of these defendants willfully disregarded the new requirements by continuing to use secret information against the applicants, deny them assistance of counsel, refuse to let them confront accusers now heard for the first time, and not let them call their own witnesses—all in direct violation of the 6th Amendment and its 14th Amendment extension. These also represent dramatic deprivals of 5th Amendment protections against getting punished without having received those due processes.

b) Accordingly, I was denied parole on the basis of the victim's supposed "letter of fear" because my letter requesting discovery had been deemed unworthy of even an acknowledgement, thus preventing me from coming prepared with proof of her ridiculing such an idea to the PSI investigator.

PROOF will consist of my letter requesting discovery, Sibbett's transcribed remarks at my 7/31/91 parole hearing, the victim's words as set down in the PSI report, and a presumed inability on Mr. Haun's part to claim that Sibbett was not carrying out his policy.

My ACTUAL INJURIES were 24 months of further incarceration from Chairman Haun's method of conducting hearings at $3500—or $84,000; and also $84,000 from Michael Sibbett for the exact same reasons.

I furthermore pray for PUNITIVE damages apportioned at 3% of $5 million--or $150,000 from Pete Haun; and 4% from Michael Sibbett--or $200,000.

The CLASS ACTION aspect would be to discover every inmate who can determine he had damaging false secret infromation used against him at his hearing.

18) LORENZO K. MILLER, Assistant A G, entered the conspiracy to suspend habeas corpus by: a) obtaining a dismissal from Judge Tibbs for the unprecedented-in-the-history-of-the United States reason I had named an innocent warden as dedendant. I was thus denied the 14th Amendment's due process and equal protection of the Utah rules of habeas corpus which require a prisoner to name the warden as defendant.

b) He next asked Judge Tibbs to become a 78-55-1 criminal by moving that the forbidden UCJA 4-501 be used to dismiss me without a hearing. Mr. Miller thereby tried to become an accomplice in the commission of a punishable offense-seemingly a far cry from his Canon of Ethics "duty to uphold legal process".

(That the Attorney General allows assistants to become law violators is heavy duty evidence how deep this conspiracy is presently embedded in Utah's court system.)

PROOF will be Miller's "argument" about warden defendants submitted with no case citations (they did not exist), and 6th District Court records showing his illegal UCJA 4-501 dismissal submittal.

My ACTUAL INJURY was 23 months of further incarceration at $3500--or $80,500.

I furthermore pray for PUNITIVE damages of 7% of my suggested $5 million --or $350,000.

The CLASS ACTION aspect would be to examine district court habeas corpus records to discover how many times the AG has submitted UCJA 4-501, and which judges agreed to participate in this violation of law.

19) JUDGE DON TIBBS, Sixth District Court, further participated in the conspiracy to suspend habeas corpus by twice ordering my re-filing refused even though it now contained the parole board as added defendant as now required for

the first time in U.S. History by Estes v Van Der Veur.

a) The first refusal violated my 1st Amendment right of access to the courts since the denial was solely based on my having directed it to "Circuit" court. My original petition had been correctly so headed, but just a month previously Manti had been elevated to district status—but with no notice having been given to Gunnison inmates. So, instead of just having my heading changed accordingly, Judge Tibbs ordered it refused with only this cryptic reason: "because their (sic) is no longer a Sixth Circuit Court in Sanpete County..." No suggestion was offered of how I might get it into the right court (which was just where he was sitting when he told his clerk to disgrace the Constitution):

b) He next decided to become an actual law violator by wrongfully refusing a habeas corpus petition (78-35-1) by returning my second re-submittal for a "failure" to pay a filing fee. Utah statute 21-7-2(2)(c) strictly forbids such a requirement.

Such willful criminal behavior deprived me of my 14th Amendment right to equal protection of the law.

PROOF will be the jury hearing the statute read and seeing the two filing refusals he had the county clerk send me.

My ACTUAL INJURY was 23 months from his 9/16/91 refusal till my July 28, 1993 release on parole at $3500 per month—or $80,000.

I furthermore pray for severe PUNITIVE damages of 9% of my hoped-for $5 million dollar total—or $450,000.

20) KIRK TORGENSEN, Assistant A G, was provably a participant in the conspiracy to suspend habeas corpus by the manner he resisted my adding another ground to my federal habeas petition #90-C-668-S. I felt my Utah habeas being thrown out for my following Rule 65B and naming the warden as defendant needed to be included. His inability to cite any precedent in history except Estes v Van

Der Veur 824 P.2d 1200 proves the depths this conspiracy plumbs and reflects his involvement in denying petitioners equal protection of the law.

Even former judges sitting on the Court of Appeals, had to invent that my not naming the Parole Board as defendant was the reason Miller and Tibbs used to correctly dismiss me--because Lorenzo Miller had not even proffered any such argument!--his argument was only that the warden had not personally deprived me of any rights. A next logical step for Mr. Torgensen would be to support a dismissal because the trial judge was not named as defendant.

PROOF would be the jury hearing Mr. Torgensen attempting to answer this question: "If the AG's role in upholding the law and seeking justice is to oppose an apparently legitimate habeas complaint, does it also encompass seeking and/or defending a dismissal based on the complaint having followed the governing rule when there was no previous case to use as a precedent?"

No ACTUAL INJURY of additional incarceration can be attributed, but I pray for a 4% PUNITIVE punishment--or $200,000.

The CLASS ACTION aspect would be to discover how many similar victims he or other Sixth District judges had so a special prosecutor could bring them to trial.

NOTE: SHOULD ANY OF THE ABOVE OR FOLLOWING JUDICIAL DEFENDANTS ATTEMPT TO CLAIM ABSOLUTE IMMUNITY, THEY WILL HAVE TO OVERCOME IMBLER V PATCHMAN US 47 L.Ed 128 ON WILLFUL VIOLATIONS UNDER 18 USC 242, SAMUEL V PITT. U 375 F Suppl 119, WHITE V FLEMING 374 F Suppl 267, AND BAUERS V HEISEL 361 F. 2d 581. OTHERS' CLAIMS OF IMMUNITY WILL FACE HAFER V MELO 112 S Ct 358 WHICH OVERRIDES ANYTHING TO THE CONTRARY.

21) Presiding Judge MICHAEL J. MURPHY, Third District Court, participated in the conspiracy to suspend habeas corpus by refusing me my 1st Amendment right of access to his court to seek redress of Judge Rigtrup's stating his court is closed to habeas complaints about lack of due process at sentencing--a 78-35-1 crime.

Instead of allowing the complaint to be filed and receive normal due process procedure, he refused it as a "nuisanse filing" saying my filing it might be an act punishable by sanctions. That action makes him liable for damages under 18 USC 242 and 28 UCS 1343 for failure under 42 USC 1986 to prevent further conspiratorial violations by a fellow district judge.

PROOF will be his 4/17/92 "sanctions" letter.

No ACTUAL INJURY of additional incarceration can be attributed, but I pray for a PUNITIVE judgement of 4%--or $200,000.

22) JOHN WAHLQUIST, Sixth District judge, likewise made himself liable under 18 USC 242, 28 USC 1343 and 42 USC 1986 when he refused to act to prevent further 42 USC 1985 conspiratorial acts by Judge Tibbs by:

a) Instead of scheduling a trial wherein I could exercise my 1st Amendment right to redress the grievance, he chose to schedule a dismissal hearing "on the Court's own motion" so certain quite astounding questions could be answered.

b) Then he cancelled that hearing to instead ask me and the newly-entered Assistant AG Carlson to submit "briefs" just as if there had been an answer, a trial, and a decision that could be appealed.

PROOF of Judge Wahlquist being an invidious moving force to ensure further violations will be having the jury hear the wording of his "Court's own motion" and hear how he tries to answer, explain or elucidate: (1) what precedent was there for his making a defense attorney-type motion; (2) why a prisoner's failure to get a summons served needs a hearing to discover why; (3) show how 78-35-1 designed to punish judges could be, or ever has been, used to fine Parole Board members $5000; and to let the jury hear just which parts of my complaint were "too ambiguous" for Judge Tibbs to be able to understand.

Further PROOF will come from the jury hearing why he asked for "briefs";

and why he was able to render a "decision" without [redacted] receiving one from Mr. Carlson; and just how the existence of more than one judge in his district as well as there being more than one county could have an effect on Judge Tibbs' learning he had been charged with a crime.

No ACTUAL INJURY of additional time served can be attributed, but I pray for a PUNITIVE judgement of 8%--or $400,000.

23) DAVID CARLSON, Assistant AG, will also be liable under 18 USC 242 and 28 USC 1343 by not only violating 42 USC 1986 by refusing to apply the state's power to prevent further 42 USC 1985 conspiratorial acts as well as criminally-punishable ones by Judge Tibbs, but actually choosing to become his defense attorney.

In defending, rather than prosecuting, criminal law violations, and in becoming an invidious moving force to ensure further violations, the Office of Attorney General brands Utah as an outlaw state.

PROOF will hinge on whether Mr. Carlson will be able to explain to the jury: (a) how a prisoner can, with no law books allowed in the prison library, make arrangements to serve the summons; (b) how a judge has absolute immunity from a law designed solely to punish judges; (c) by what route or precedent has a case ever proceeded to the Court of Appeals absent [redacted] a charge ever being answered, or tried from which an appeal could be taken; (d) show his precedent of the Court of Appeals bringing charges and fining a judge the $5000 of statute 78-35-1; (e) provide a citation of any appeals court anywhere ever bringing charges (other than contempt of court) against anybody.

No ACTUAL INJURY of additional time served can be attributed, but I pray for a stringent PUNITIVE award of 7%--or $350,000.

THE FOLLOWING TWO DEFENDANTS, while clothed in the authority of state-derived powers to correct judges' and attorneys' law and ethical violations set

forth above, willfully refused to do so. Instead they conspired to come to the defense of the practitioners of the conspiracy to suspend habeas review of plea bargains being nullified so original-charge sentences can be imposed.

THAT DEFENSE CONTAINS AN ADMISSION OF GUILT FOR THEIR "CLIENTS", AND THUS PROOF OF MY CONSPIRACY CHARGES. IT DID SO BY SAYING SUCH ACTIVITY IS STANDARD ETHICAL PRACTICE IN UTAH.

These defendants also proved their own active participation in the conspiracy by going so far as to lie about the content of the laws and rules violated.

In refusing to confront the perpetrators, but accepting instead no-contest admissions of guilt as a foundation for exoneration, these defendants conspired to continue as a moving force for further willful violations of Article I Section 9's guarantee of habeas corpus, the First Amendment's guarantee of redress of grievances, and continued Utah violations of the Fifth and Sixth Amendments' guarantees of due process.

This conspiracy has caused a nullification of Corpus Juris Secundum, Sections 145 thru 150 that "Judges are to protect the rights of the individual, not to conspire to subvert those rights."

24) DEAN W. SHEFFIELD of the Judicial Conduct Commission, in response to my complaints of some of the violations set forth above:

a) Said Judge Tibbs' clerk must have acted on her own (but presumably never asked her) when my habeas petition was refused for no filing fee, and then lied by saying that such petitions do require the payment of such a fee.

PROOF will be reading the fee rule and his letters to me dated 5/29/92 and 9/16/93.

b) Next, he decided that Judge Sawaya's illegal dismissal using the forbidden UCJA Rule 4-501 was not any problem for his commission.

PROOF will be his 9/16/93 letter to me and reading the duties of his commission under the laws of Utah for the jury's consideration.

c) He used the same words to dismiss my complaint of Judge Rigtrup's saying that his court is closed for habeas consideration of Constitutional violations by a sentencing judge--thus suspending habeas corpus.

PROOF will be the same as in (b) above.

No ACTUAL INJURY for additional time served but I am praying for a PUNITIVE award of 6%--or $300,000.

25) P. GARY FERRERO of the Utah State Bar participated in the conspiracy by:

a) Responding that Dan Larsen's and Lorenzo Miller's illegal submittals of UCJA Rule 4-501, and that Larsen's tacit admission that he is a part of Utah's suspension of habeas corpus--neither one constituting any evidence of an ethical violation.

b) He furthermore justified the use of the rule to dismiss habeas petitions for it being an "adopted court rule". He thus supplied conclusive proof of the statewide conspiracy to suspend habeas corpus review of using secret information to illegally sentence plea bargainers to original-charge terms because Webster defines ethical as "conforming to accepted standards of professional conduct."

PROOF will be my complaint letter of Feb.11, 1993, Mr. Ferrero's responses of 5/3/93 and 6/22/93, plus the jury hearing a reading of Rule 4-501.

c) Mr. Ferrero additionally conspired to endorse Assistant AG Carlson's intervening as defense attorney, rather than prosecutor, to proffer the unbelievable claim that Judge Tibbs, being a judge, has absolute immunity from a law solely enacted to punish judges.

PROOF will again be my cpmplaint letter and the response to it which I don't seem to be able to locate. That should not be a problem.

I claim no ACTUAL INJURY, but pray for a substantial PUNITIVE award of 6% of my suggested $5 million total--or $300,000.

In view of the reality of this statewide conspiracy to support and defend, rather than prosecute, crimes by public officials, I will only state for the record that both former governor, NORMAN BANGERTER, and present governor, MICHAEL LEAVITT, were both given a full apprisal of the foregoing defense counsel/ AG / judge unconstitutional behavior. Both chose, however, to become integral moving forces in the conspiracy by not even acknowledging receipt of the information--let alone initiating any action to curb further violations. Maybe issue a joinder??

BASIS FOR MONETARY DAMAGES AND PUNISHMENT: By reason of the conduct of the defendants, or as part of their governmental entity's participation in the conspiracy to void plea bargains so original-charge punishments can be imposed without the expense of trials, each one became separately liable the months in prison his or her unconstitutional acts caused. In so doing, they deprived me of one, or more, or all of the following rights, privileges and immunities secured to me by the Constitution of the United States:

a. The right to have habeas corpus procedure open to me under Article I Section 9.

b. The right to petition the courts for redress of grievances under the First Amendment.

c. The right not to be deprived of liberty without due process of law under the Fifth Amendment.

d. The right in all liberty-interest proceedings to be informed of the nature of the accusations; to confront witnesses against me; to have my own witnesses; and to have assistance of counsel--all under the Sixth Amendment.

The basis of my claims for actual injury is $2500 per month compensating for loss of salary, plus $1000 per month nominal for the mental suffering and anguish for being in prison instead of outside on probation, or from a habeas-ordered re-sentencing, or a new parole hearing. I have put forth amounts based

on the comparative negligence or illegal acts of each defendant.

Furthermore, the acts, conduct and behavior of the defendants were performed knowingly, intentionally and maliciously which entitles me to an award of punitive damages. I have suggested the amount of 5 million dollars to be assessed according to the apparent willful misconduct and to the resulting damage to me or justice under law.

Whatever the final amount of all damages awarded, I hereby pledge all monies over $750,000 to create a class action remedy fund to get relief for the hundreds, or thousands of past and present inmates who were incarcerated and/or denied parole because of false unchallenged secret information; and for all who were denied habeas corpus hearings through illegal or unconstitutional court procedure; or were unable to pursue such actions because of the absence of prison law libraries or crippling restrictions deliberately imposed on contract attorneys.

On the off-chance the perpetrators try to avoid responsibility for their illegal/unethical conspiratorial acts with an answer of mootness, lack of standing or statute of limitations because I am no longer behind bars, I now reply with the preemptive fact that my "freedom" can be ended without even the benefit of a hearing should I be seen drinking beer, or visiting my adoring grandkids without a parent present, cook with wine, or go hiking on Wheeler Peak ,Nev. etc., etc.

And the decision would rest with defendant Michael Sibbett.

Furthermore, I ask this Court for acknowlegement of Utah precept as set forth in Jensen v. DeLand Ut S. Ct. 870107 and Martinez v. Smith 602 P.2d 700/702 that "to dismiss should be regarded as admission of allegations to be true. Judge should not cater to prosecution [here as defendants] whim but proceed to determine the facts."

Preliminary to my listing of my previous related court actions and my prayer for relief, I now quote Article I Section 11 of the Utah Constitution. For five years I have been deprived of this fundamental guarantee of a civilized way to redress wrongs by the very public servants who have sworn to uphold the efficacy and regular adherence to its provisions:

> "Courts shall be open, and every person, for an injury to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unneccessary delay."

PREVIOUS RELATED LAWSUITS

If any defendant challenges the existence of conspiracy, he need first proffer a logical explanation how the following actions were, in five years, unable to bring about their one purpose: a hearing where I would be allowed to show ineffectiveness of counsel had Judge Cornaby sentence me as a dangerous repeat offender from deliberate PSI report lies I never got to expose; or one where I could challenge similar unconstitutional Parole Board actions.

Absent such explanations for this unprecedented list, defenses should accordingly be regarded as mere technical evasions in keeping with the foregoing illegal and/or unconstitutional actions made to avoid uncovering the root purpose of nullifying plea bargains to get original-charge punishments without the cost of trials or habeas corpus exposure of that conspiracy:

ACTION	COURT	CASE #	DATE	PARTIES	JUDGE	OUTCOME
Mot.for Stay Execut.	2nd Dist.	5983	7/28/88	Utah v. Estes	Cornaby	Denied
Cert. Probable Cause	Ut. Su. Ct.	880279	8/1/88	Utah v. Estes		Denied
Mot. Withdr. Plea	2nd Dist.	5983	12/14/88	Utah v. Estes	Cornaby	Denied

Writ Habeas Corpus	UT Sup. Ct.	880279 880329	9/8/88	Estes v. Warden		Dismissed
Cert. Probable Cause	2nd Dist.	5983	9/20/88	Utah v. Estes	Cornaby	Denied
New Cert. Prob. Cause	UT Sup. Ct.	880279	12/31/88	Utah v. Estes		Denied
Appeal Trial (senten)	UT Sup. Ct. Ct.of Appls	880279 890271	4/17/89	Utah v. Estes		Confirmed
Certiorari	UT Sup. Ct.	890271	1/3/90	Utah v. Estes		Denied
Writ Habeas Corpus	3rd District	900901219	1/29/90	Estes v Warden	Rigtrup	Dismissed
Appeal Dismissal	UT Sup. Ct.	90015	4/7/90	Estes v Warden		Confirmed
Second Habeas Corpus	3rd District	900903466	6/2/90	Estes v Warden	Sawaya	Dismissed c UCJA 4-5(
Enforce Right to HC Hearing	UT Sup. Ct.	??	7/27/90	Estes v Warden		Denied
Appeal H.C. Dismissal	Ct. of Appl.	900418	4/1/91	Estes v Warden		Confirmed
Certiorari	UT Sup. Ct.	900418	10/24/91	Estes v Warden		Denied
28 USC 2254 H.C.	U.S. Dist.	90-C-0668	9/10/90	Estes v Warden	Sam	Dismissed non-exhaus
Appeal 2254 Dismissal	U.S. 10th Circuit	91-4091	4/1/91	Estes v Warden		Confirmed
Writ Habeas Corpus	U.S. Supr Ct	92-5034	10/15/92	Estes v Warden Van Der Veur		Denied
28 USC 2254 remanded after exhaustion	U.S. Distr.	90-C-668	2/12/92	Estes v Warden	Sam	Dismissed
Appeal of 2254 Dism.	U.S. 10th Cr	93-4086	5/?/93	Estes v Warden		Confirmed
42 USC 1983	U.S. Distr.	92-C-223	2/2/92	Estes v Dept. Corrections	Sam	Dismissed
Appeal of 1983 Dism	US 10th Circ	92-4087	6/5/92	ditto		Confirmed
Certiorari	US Supr. Ct.	92-6557	11/10/92	ditto		Denied
Petition to Re-hear	US Supr. Ct	92-6557	1/25/93	ditto		Denied
Writ Habeas Corpus	6th District	9947	8/5/91	Estes v Warden Van Der Veur	Tibbs	Dismissed

Appeal of H.C. Dismi	UT S Ct/Appl	910613-CA	9/30/91	ditto		Confirmed
Certiorari	UT Supr Ct.	92103	2/3/92	ditto		Denied
Re-subm w/added def. Habeas Corpus	6th District	920600157	1/31/92	Estes v Van Der Vuer & Bd Pard	Mower	Dismissed
Appeal of H.C. Dismi	Appeals Crt	930083-CA	2/4/93	ditto		Confirmed
Certiorari	UT Supr Ct	930348	3/3/92	ditto		Mooted (par
78-35-1 Complaint	6th District	920600148	3/23/92 6/7/92	Estes v Tibbs	Wahlquist	Dismissed

PRAYER FOR RELIEF

Therefore, I, the plaintiff, Newton C. Estes, pray that the defendants each be cited to answer this complaint, and that plaintiff have judgement for the actual damages I have set forth above, and for the further sum of $5,000,000 exemplary punitive damages from eighteen or more of them on account of their malfeasance or malice, and the costs of this civil rights suit and other general and equitable relief. Or as otherwise decided by the jury.

Respectfully submitted on this 18th day of July, 1994.

Newton C. Estes

Newton C. Estes

The undersigned declares under penalty of perjury that the information contained herein is true and correct. (As to be proved by the record of the above 30 court actions)

Newton C. Estes

Newton C. Estes

CERTIFICATE OF MAILING: I hereby certify that, in accordance with Magistrate

Alba's advice on how to proceed, I mailed a copy of this Amended Civil Rights Complaint on this 18th day of July, 1994 to these Defendants who were previously served a copy with summons requiring an answer in 20 days, or mailed a Waiver of Service for Summons request requiring an answer within 60 days of that June 20 mailing. Presumably receipt of all answers now become due 20 days after this mailing plus 3 days for delivery to defendant, plus another 3 days for delivery to me and the Court from defendant: (1) Brian Namba, Deputy Davis County Attorney P.O. Box 618, Farmington, UT 84025; (2) Steve Vanderlinden, C/O Dennis Day (guardian), 2218 N 1300 W, Clinton, UT 84015; (3) Judy Valeika, Adult Probation & Parole, P.O. Box 700, Farmington, UT 84025; (4) Judge Douglas Cornaby, 3612 N 2900 E, Layton, UT 84040; (5) Jay Edmonds, 1660 Orchard Drive, Salt Lake City, UT 84106; (6) Dan R. Larsen, Asst. Utah Attorney General, 330 S 300 E, Salt Lake City UT 84111; (7) Judge Kenneth Rigtrup, Third District Court, 240 E 400 S, Salt Lake City UT 84111; (8) Judge James Sawaya, 683 E 4800 S, Murray, UT 84107; (9) Craig Ludwig, Clerk of the Court, Third Distrcit Court, 240 E 400 S, Salt Lake City UT 84111; (10) Judge David Sam, United States District Court, 350 South Main St., Salt Lake City UT 84101; (11) Angela Micklos, Asst. Utah Attorney General, 124 State Capitol, Salt Lake City UT 84114; (12) Gary De Land, P.O.Box 579, Santa Clara, UT 84765; (13) Lane McCotter, c/o Utah Dept. of Corrections, 6100 S 300 E, #400, Murray, UT 84107; (14) Eldon Barnes, 986 Granite Peak Drive, Sandy, UT 84094; (15) Warden Fred Van Der Veur, Central Utah Correctional Facility, Gunnison, UT 84634; (16) Pete Haun, c/o Utah Board of Pardons, 448 East 6400 South #300, Murray, UT 84107; (17) Michael Sibbett, c/o Utah Board of Pardons, 448 E 6400 S #300, Murray, UT 84107; (18) Lorenzo K. Miller, Asst. Utah Attorney General, 330 S 300 E, Salt Lake City, UT 84111; (19) Judge Don Tibbs, Sixth District Court, 160 North Main Street, Manti, UT 84642; (20) Kirk

M. Torgensen, Asst. Utah Attorney General, 236 State Capitol, Salt Lake City, UT 84114; (21) Judge Michael Murphy, Third District Court, 240 E 400 S, Salt Lake City, UT 84111; (22) Judge John Wahlquist, 25 Amistad, Irvine, CA 92720; (23) David M. Carlson, Asst. Utah Attorney General, 330 S 300 E, Salt Lake City, UT 84111; (24) Dean W. Sheffield, c/o Judicial Conduct Commission, 3760 Highland Drive, #246, Salt Lake City, UT 84106; (25) P. Gary Ferrero, c/o Utah State Bar, 645 S 200 E, #205, Salt Lake City, UT 84111.

Newton C. Estes

Newton C. Estes
372 E 700 N
Kaysville, UT 84037
Phone: 801/544-5253

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

FILED
FEB 13 1995
DEPUTY CLERK

NEWTON C. ESTES,	)	
	)	
Plaintiff,	)	Case No. 94-NC-089 W
	)	
vs.	)	
	)	
BRIAN NAMBA, et al.,	)	REPORT AND RECOMMENDATION
	)	
	)	
Defendants.	)	

Plaintiff, Newton C. Estes, commenced this action on June 17, 1994, pursuant to 42 U.S.C. §§ 1983, 1985 and 1986, claiming constitutional violations arising out of an alleged conspiracy among the twenty-five named defendants "to nullify plea bargains by suspending habeas corpus review of courtroom victims receiving original-charge punishments through the use of false secret information by the sentencing judge and parole board." (Compl. at 2, File Entry #1; Am. Compl. at 2, File Entry # 30.)

The individuals named in the plaintiff's complaint include the following non-state employees as defendants: Brian Namba, Davis County Prosecutor; Steve Vanderlinden, defense attorney and public defender; Jay Edmonds, attorney; Dean Sheffield, Judicial

Conduct Commission; Gary Ferraro, Utah State Bar; and United States District Court Judge David Sam. Additionally, the following individuals employed by the State of Utah (collectively referred to as the "state defendants") were named: Judy Valeika, Adult Probation and Parole investigator; The Honorable Douglas Cornaby; Dan Larsen, Assistant Attorney General; The Honorable Kenneth Rigtrup; The Honorable James Sawaya; Craig Ludwig, Third District Court Clerk; Angela Micklos, Assistant Attorney General; Gary DeLand, former director of Department of Corrections; O. Lane McCotter, director of Department of Corrections; Eldon Barnes, former warden at Utah State Prison; Fred Vanderveur, warden at Gunnison Correctional Facility; Pete Haun, former chairman of Parole Board; Michael Sibbett, chairman of Parole Board; Lorenzo Miller, Assistant Attorney General; The Honorable Don Tibbs; Kirk Torgensen, Assistant Attorney General; The Honorable Michael Murphy; The Honorable John Walhquist; and David Carlson, Assistant Attorney General.

PROCEDURAL BACKGROUND

The case was assigned to United States District Judge David K. Winder, who subsequently referred the matter to the magistrate

judge pursuant to 28 U.S.C. § 636(b)(1)(B). The case was then assigned to United States Magistrate Judge Samuel Alba.

On June 24, 1994, the magistrate judge ordered the plaintiff to file an amended complaint, due to the fact that the vague and conclusory allegations contained in the original complaint failed to state a claim. (File Entry #24.) The plaintiff filed his amended complaint on July 18, 1994. (File Entry #30.)

Motions to Dismiss the plaintiff's amended complaint, pursuant to Fed. R. Civ. P, 12(b)(6), were filed by or on behalf of all of the defendants (except Steve Vanderlinden[1]), along with supporting memoranda. (File Entries #33-Edmonds, #35-Sheffield, #37-Namba, #42-Ferraro, #45-all state defendants, and #58-Sam.)

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[1]A motion to quash attempted service of process on Mr. Vanderlinden was filed by Michael Nielsen, by special appearance, on July 8, 1994. (File Entry #28.) The magistrate judge granted the motion on August 1, 1994, finding that due to defendant Vanderlinden's present incapacity, plaintiff had not complied with the service requirements set forth in Fed. R. Civ. P. 4(g) and Utah R. Civ. P. 4(e)(3). (File Entry #32.) Plaintiff again attempted service of process on Mr. Vanderlinden through Mr. Nielsen. (File Entry #40.) Mr. Nielsen subsequently advised the court that he is unable to accept service of process because he is not the guardian or conservator of Mr. Vanderlinden. (File Entry #52.) At the hearing on the other defendants' motions to dismiss, plaintiff agreed to withdraw his claims against Mr. Vanderlinden. Accordingly, this Court recommends that all claims against Mr. Vanderlinden be dismissed with prejudice.

The plaintiff filed responses to the defendants' motions (File Entries #48-51, 56 and 60), to which the defendants replied (File Entries #54-Edmonds, #55-Ferraro, #65-state defendants, and #67-Sam). Additionally, plaintiff filed a "Motion to Not Allow Atterney [sic] General to Engage in Federal Courtroom Racketeering by Representing Judicial Defendants; and Disqualification from Representing other Defendants." (File Entry #44.) The state defendants filed a memorandum in opposition to the plaintiff's motion. (File Entry #66.) At the hearing on the motions to dismiss, the plaintiff withdrew the above motion. (File Entry #69.)

A hearing on the defendants' motions to dismiss plaintiff's amended complaint was held before the magistrate judge on September 19, 1994. The Court heard oral arguments from the plaintiff, pro se; Gerald Hess, for defendant Namba; Jay Edmonds, pro se; Stephen Sorenson, Assistant United States Attorney, for defendant Judge Sam; Carman Kipp and Kirk Gibbs, for defendant Ferrero; Dean Sheffield, pro se; and Mark Shurtleff, Assistant Attorney General, for the state defendants. Plaintiff orally requested leave to file a second amended complaint, which the

Court denied. Additionally, the plaintiff was notified that the Court will recommend that sanctions be imposed on the plaintiff, under Fed. R. Civ. P. 11, should the plaintiff seek to amend his complaint in the future without remedying the pleading deficiencies as to the conspiracy claim.

After a thorough review of all pleadings and consideration of the oral arguments presented at the hearing on the motions to dismiss, the Court issues the following Report and Recommendation.

FACTUAL BACKGROUND[2]

Plaintiff's alleged web of conspiracy begins when he was arraigned on a criminal matter in Utah State Court in January of 1988. Plaintiff describes the "conspiracy" as follows:

> a conspiracy to nullify plea bargains by suspending habeas corpus review of courtroom victims receiving original-charge punishments through the use of false secret information by the sentencing judge and parole board. The purpose is to achieve the same result without the cost of a trial.

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[2]The facts set forth below are based solely on the allegations made in the plaintiff's amended complaint, and are presumed to be true only for purposes of this 12(b)(6) motion.

(Am. Compl. at 1.)[3]

Defendant Namba was the prosecuting attorney at the arraignment. (Am. Compl. at 2.) Plaintiff alleges that he asked Namba to recommend an attorney and was given defendant Steve Vanderlinden's name. (Id.) Defendant Vanderlinden represented plaintiff in the criminal matter. (Am. Compl. at 3.)

At some point in either June or July of 1988, plaintiff pled guilty in the criminal action. Plaintiff alleges that, in connection with his guilty plea, Vanderlinden tried to get him to sign an affidavit dated June 21, 1988, that contained admissions concerning the original criminal charges brought against the plaintiff. (Am. Comp. at 3.) Plaintiff attributes authorship of this affidavit to defendant Namba. (Am. Compl. at 2.)

In connection with the plaintiff's sentencing in July of 1988, plaintiff claims that Vanderlinden did not obtain plaintiff's presentence report until 20 minutes before the

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[3]The plaintiff spins each of the named defendants into the alleged web of conspiracy by attributing their involvement in the proceedings subsequent to the plaintiff's plea bargain and sentencing in July of 1988, as somehow connected with the conspiracy. This is accomplished by making broad and conclusory allegations that a particular defendant's actions, in some unspecified way, manifest involvement in a conspiracy against the plaintiff.

sentencing hearing. (Am. Comp. at 3.) Plaintiff further alleges that the presentence report was very lengthy and filled with lies. According to the plaintiff, Vanderlinden did not review the report nor did he challenge the contents at the hearing. As a result plaintiff alleges that he was sentenced as a "dangerous repeat offender." (Am. Compl. at 3-4.)

Plaintiff also claims that Vanderlinden perjured himself at a hearing on November 17, 1992, before United States Magistrate Judge Ronald Boyce, concerning plaintiff's federal habeas petition. Plaintiff alleges that Vanderlinden testified that the presentence reports are not available to defendants until just before sentencing. (Am. Compl. at 4.) Additionally, plaintiff claims that Vanderlinden allowed Namba to present negative evidence against plaintiff to the sentencing judge outside of the plaintiff's presence. (Am. Compl. at 4-5.)

Defendant Judy Valeika was the Adult Probation and Parole investigator tasked with preparing plaintiff's presentence report. Plaintiff alleges that the report contained lies and unconfirmed rumors. (Am. Compl. at 5-6.) Plaintiff also claims that Valeika told him that he was not allowed to see his

presentence report. (Am. Compl. at 5.)

Judge Douglas Cornaby, of the Second District Court for the State of Utah, sentenced the plaintiff in the underlying criminal matter. Plaintiff alleges that Judge Cornaby sentenced him as a "high risk offender with deep-seated sexual problems," despite plaintiff's professions that the presentence report contained lies and false rumors. (Am. Compl. at 6-7.) Judge Cornaby also denied plaintiff's motion to withdraw his plea. (Am. Compl. at 25.)

Defendant Jay Edmonds handled plaintiff's appeal. (Am. Compl. at 7.) Plaintiff claims that Edmonds failed to raise Vanderlinden's ineffective assistance of counsel as a basis for appeal. (Am. Compl. at 7.)

Defendant Dan Larsen, Assistant Attorney General, represented the state's interest in connection with two of plaintiff's habeas corpus petitions (#900901219 and #900903466). (Am. Compl. at 8.) The first petition was dismissed by Judge Kenneth Rigtrup, of the Third District Court for the State of Utah, (Am. Compl. at 8-9, 26), while the second one was dismissed by Third District Court Judge James Sawaya, pursuant to "UCJA 4-

501." (Am. Compl. at 9, 26.)

Plaintiff alleges that defendant Craig Ludwig, Clerk for the Third District Court, State of Utah, failed to mail notification to the plaintiff of the "two dismissal hearings" that took place before Judge Rigtrup in case #900901219. (Am. Compl. at 10.)

At some point during 1990, plaintiff filed a 28 U.S.C. § 2254 petition (90-C-0668) in the United States District Court for the District of Utah. The case was assigned to United States District Court Judge David Sam, who dismissed the petition upon the Report and Recommendation of United States Magistrate Judge Ronald Boyce. (Am. Compl. at 11-12, 26.) Plaintiff alleges that the dismissal was primarily based on the "perjur[ed]" testimony of Vanderlinden and that in his objection to the Report and Recommendation, he provided Judge Sam with proof of the perjury. (Am. Compl. at 11-12.) Plaintiff also alleges that defendant Angela Micklos, Assistant Attorney General, filed an answer to plaintiff's objection to the Report and Recommendation urging the court to adopt it. Plaintiff claims that Micklos violated the Rules of Professional Conduct in failing to institute proceedings against Mr. Vanderlinden, the alleged perjuror. (Am. Compl. at

12.) Plaintiff complains that Kirk Torgensen, Assistant Attorney General, participated in the "conspiracy" when he "resisted" the plaintiff's attempt to add another ground to his petition. (Am. Compl. at 17-18.)

In 1992, plaintiff filed a second action in the United States District Court pursuant to 42 U.S.C. § 1983 (92-C-223), alleging constitutional violations concerning his access to legal materials or contract attorneys, and denial of a typewriter and copy machine. The case was again assigned to Judge Sam and subsequently dismissed prior to service of process on the named defendants. (Am. Compl. at 10-11, 26.)

Plaintiff alleges that defendants Gary DeLand, Lane McCotter, Eldon Barnes and Fred Van Der Veur, all associated with the Department of Corrections, participated in the alleged conspiracy to suspend prisoners' habeas corpus review by selecting the "contract attorney option" for providing legal services to inmates and by denying inmates access to typewriters or copy machines. (Am. Compl. at 13-14.)

Plaintiff alleges that defendants Pete Haun and Michael Sibbett, parole board members, violated plaintiff's

constitutional rights during his parole hearing when they denied him parole. Plaintiff alleges that Haun and Sibbett used "secret information" against him, denied him assistance of counsel, refused to let plaintiff confront his accusers, and did not let plaintiff call his own witnesses. (Am. Compl. at 15.)

Defendant Lorenzo Miller, Assistant Attorney General, represented the state in connection with another habeas corpus petition filed (#9947). Plaintiff alleges that defendant Miller obtained a dismissal of the petition from Sixth District Court Judge Don Tibbs on the basis that he had "named an innocent warden" and pursuant to "UCJA 4-501." (Am. Compl. at 16.) Plaintiff also complains that Judge Tibbs wrongfully refused the refiling of plaintiff's petition on the grounds that it was directed to the wrong court and plaintiff failed to pay a filing fee. (Am. Compl. at 17.)

Plaintiff claims that defendant Third District Court Judge Michael Murphy participated in the "conspiracy" when he refused the filing of a civil complaint by plaintiff in Utah state court against Judge Rigtrup, characterizing it as a "nuisance filing" and threatening sanctions. (Am. Compl. at 19.) Plaintiff

alleges similar actions by defendant Sixth District Court Judge John Wahlquist when he refused to act to prevent "further conspiratorial acts by Judge Tibbs." (Am. Compl. at 19-20.) Plaintiff also alleges that defendant David Carlson, Assistant Atorney General, participated in the "conspiracy" when he chose to defend Judge Tibbs, instead of prosecuting him. (Am. Compl. at 20.)

Defendant Dean Sheffield's alleged connection to the "conspiracy" stems from his role on the Judicial Conduct Commission, where he refused to discipline Judges Tibbs, Sawaya and Rigtrup for their actions. (Am. Compl. at 21-22.

Defendant Gary Ferrero, of the Utah State Bar, is allegedly connected to the "conspiracy" as a result of his failure to censure Assistant Attorneys General Larsen and Miller for their actions concerning his various habeas corpus petitions, and Assistant Attorney General Carlson for his role as defense attorney for Judge Tibbs. (Am. Compl. at 22.)

Following the plaintiff's guilty plea and sentencing for the underlying criminal action, plaintiff filed an appeal. Plaintiff's conviction was affirmed on or about April 17, 1989.

(Am. Comp. at 25-26.) During the period of 1990 through 1992, plaintiff filed three habeas corpus petitions in Utah State Court (#900901219, #900903466, and #9947, resubmitted as #920600157). All of these petitions were dismissed. Plaintiff exercised his right to appeal, and the dismissals were affirmed. (Am. Compl. at 26-27.) In 1990 and Plaintiff filed a habeas corpus petition, pursuant to 28 U.S.C. § 2254, in the United States District Court for the District of Utah, which was subsequently dismissed and affirmed upon appeal to the Tenth Circuit. (Am. Compl. at 26.) In 1992, plaintiff filed a civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Utah, which was subsequently dismissed and affirmed upon appeal to the Tenth Circuit. (Am. Comp. at 26.) In 1992, plaintiff filed a complaint against Judge Tibbs in the Sixth District Court for the State of Utah, which was dismissed. (Am. Compl. at 27.)

STANDARD FOR DISMISSAL PURSUANT TO FED. R. CIV. P. 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides a mechanism for dismissal of a complaint where the

plaintiff fails to "state a claim upon which relief can be granted." In reviewing the sufficiency of the complaint, a court "presumes all of plaintiff's factual allegations are true and construes them in a light most favorable to the plaintiff." E.g., Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Where a complaint has been filed by a pro se litigant, the court should construe the complaint liberally and hold it to a "less stringent standard than formal pleadings drafted by lawyers." Id. at 1110 (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)). The Tenth Circuit has interpreted this rule to mean that if "the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." Id.

In requiring a broad reading of a pro se plaintiff's complaint, however, the plaintiff is not relieved of the burden of alleging "sufficient facts on which a recognized legal claim could be based." Id. "[C]onclusory allegations without

supporting factual averments are insufficient to state a claim on which relief can be based." Id. (citing Dunn v. White, 880 F.2d 1188, 1197 (10th Cir. 1989), cert. denied, 493 U.S. 1059, 110 S.Ct. 871 (1990); Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983); Clulow v. Oklahoma, 700 F.2d 1291, 1303 (10th Cir. 1983), overruled on other grounds sub nom, Garcia v. Wilson, 731 F.2d 640 (10th Cir: 1984), aff'd, 471 U.S. 261 (1985); Lorraine v. United States, 444 F.2d 1, 2 (10th Cir. 1971)). "Moreover, in analyzing the sufficiency of the plaintiff's complaint, the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations." Hall, 935 F.2d at 1110 (citing Dunn, 880 F.2d at 1190).

DISCUSSION

The defendants raise numerous grounds in arguing that plaintiff's Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Defendants first argue that since plaintiff's § 1983 claim is grounded on the alleged illegality surrounding plaintiff's criminal conviction and sentence, the recent Supreme Court case of Heck v. Humphrey, 114 S.Ct. 2364

(1994), bars such a claim absent a showing that the plaintiff's conviction or sentence was invalidated. Defendants next attack the sufficiency of the facts alleged in connection with the plaintiff's §§ 1985 and 1986 claims, arguing that the plaintiff failed to allege a prima facie case of discrimination or conspiracy. Additional bases for dismissal relied upon by the defendants include absolute and qualified or "good faith" immunity. Defendant Edmonds argues that his status as plaintiff's appeals attorney does not make him a "state actor" for purposes of § 1983 liability. Finally, several of the defendants raise statute of limitations, service of process and Eleventh Amendment issues in support of dismissal.

I. Cognizability of § 1983 Claim Based on Illegality of Plaintiff's Conviction, Sentence or Incarceration.

The defendants urge the court to dismiss the plaintiff's §1983 claim based on the recent Supreme Court ruling in Heck v. Humphrey, 114 S.Ct. 2364 (1994). In Heck, the Court considered the cognizability of a § 1983 claim seeking damages for an allegedly unconstitutional conviction or imprisonment. Recognizing the need for finality and consistency in criminal proceedings, the Court held that:

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, [footnote omitted] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. **A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.** Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id. at 2372 (emphasis supplied).

In the case at hand, the basis of plaintiff's § 1983 claim centers on the plea bargain and sentencing aspect of plaintiff's underlying criminal conviction, alleging a widespread conspiracy among the numerous defendants. Unquestionably, a judgment in favor of plaintiff's § 1983 claim would necessarily imply that plaintiff's sentence was invalid. Under the precedent established in Heck, the plaintiff does not have a cognizable

action under § 1983 unless he can show that his sentence has already been invalidated. Based on a review of the plaintiff's complaint, it is clear that despite the numerous attempts to collaterally attack his state court sentence, the plaintiff's sentence has not been reversed on direct appeal, expunged by executive order or declared invalid. Thus, the plaintiff does not have a cognizable action under § 1983 and this claim should be dismissed. Heck, 114 S.Ct. at 2372.

II. Sufficiency of the Allegations Under 42 U.S.C. §§ 1985 and 1986.

There are three subsections to 42 U.S.C. § 1985, which provide remedies for injuries or deprivation arising out of a conspiracy to interfere with civil rights. Subsections (1) and (2) are not applicable to the facts alleged by the plaintiff.[4] The remaining subsection (3) appears to be most closely related

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[4]Subsection (1) of § 1985 provides a cause of action where an alleged conspiracy has prevented a person from taking federal office or prevented a federal official from discharging his or her official duties. The plaintiff in the instant case is a private citizen and has not made any allegations that he has been prevented from taking a federal office. Subsection (2) concerns the intimidation of participants in federal court from testifying in court or injury to such participants for having so testified. Plaintiff has not alleged any acts of intimidation or injury in connection with testimony at a federal court proceeding. Thus, plaintiff has failed to state a claim under § 1985(1) or (2).

to the allegations set forth in the plaintiff's complaint. Section 1985(3) provides in pertinent part:

> If two or more persons . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . [or] cause to be done, any act in furtherance of the object of such conspiracy . . . the party so injured or deprived may have an action for the recovery of damages....

42 U.S.C. § 1985(3) (1994).

In order to state a cause of action under § 1985(3), the plaintiff must allege four essential elements: "(1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom." Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971)), cert. denied, 114 S.Ct. 925 (1994); Seamons v. Snow, 864 F. Supp. 1111, 1123 (D. Utah 1994); Taylor v. Federal Home Loan Bank Board, 661 F. Supp. 1341, 1345 (N.D.Tex. 1986). Defendants argue that the plaintiff's complaint fails to sufficiently allege the foregoing essential elements and, therefore, fails to state a claim under

§1985. This Court agrees. A broad reading of the allegations contained in the plaintiff's amended complaint reveals that it is deficient, in several respects, and does not support of a cause of action under § 1985.

First, it is clearly established that broad, conclusory allegations of a conspiracy to violate civil rights are insufficient to support such a claim. Taylor, 661 F. Supp. at 1345; Martin v. Delaware Law School of Widener University, 625 F. Supp. 1288, 1297 (D.Del. 1985), cert. denied, 493 U.S. 966 (1989). Rather, a plaintiff must plead specific, admissible facts "supporting an inference that Defendants reached a 'meeting of the minds.'" Seamons, 864 F. Supp. at 1123; see Gallegos v. City and County of Denver, 984 F.2d 358, 364 (10th Cir. 1993), cert. denied, 113 S.Ct. 2962 (1993); Taylor, 661 F. Supp. at 1345; Martin, 625 F. Supp. at 1297. It is not enough to show merely that the defendants had a common goal or acted in concert. Martin, 625 F. Supp. at 1297. In the instant case, the plaintiff makes broad and conclusory allegations of a wide-spread conspiracy among the named defendants, yet provides no specific or admissible facts identifying how the defendants came to an

agreement to act in concert to deprive the plaintiff of his constitutional rights.

Another significant pleading deficiency relating to plaintiff's § 1985 claim concerns the second element set forth above, which requires that the plaintiff show that the conspiracy was formed for the purpose of depriving the plaintiff of "equal protection or equal privileges and immunities." Tilton, 6 F.3d at 686. Focusing on the "equal protection or equal privileges and immunities" language contained in § 1985(3), the Supreme Court in Griffen v. Breckenridge, 403 U.S. at 101-102, held that §1985(3) does not "apply to all tortious, conspiratorial interferences with the rights of others," but rather, only to conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Id.; Bisbee v. Bey, 39 F.3d 1096, 1102 (10th Cir. 1994); Tilton, 6 F.3d at 686; Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 748 (10th Cir. 1980), cert. denied, 454 U.S. 833 (1981); Haston v. Galetka, 799 F. Supp. 1129, 1131 (D. Utah 1992). The "other 'class-based animus'" language of this requirement has been narrowly construed and does not, for example, reach conspiracies motivated by an

economic or commercial bias." Tilton 6 F.3d at 686. "In fact, the Supreme Court has held that 'it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their case.'" Id. (quoting United Bhd. of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 837 (1983)).

It is clear from the plaintiff's complaint that he is not claiming that the conspiracy was movitated by some race based discriminatory animus. Thus, that leaves the question of whether plaintiff has alleged facts supporting a class-based discriminatory purpose. A class of individuals that is "suffering from [a] discriminatory animus must be comprised of members defined by immutable characteristics for which the members of the alleged class have no responsibility, e.g., racial or sexual characteristics." Taylor, 661 F. Supp. at 1347; see Silkwood, 637 F.2d at 747 (no class-based animus directed toward group "which did not tend to exist prior to the occurrence of the events set forth in the complaint and which [tended] to be defined by one particular activity or by plaintiff's individual situation"). Here, plaintiff contends that he is a member of a

class of "plea bargainers" who have been discriminated against as a result of a "conspiracy." The Court finds, however, that for purposes of § 1985 liability, "plea bargainers" are not a protected class of individuals with characteristics not susceptible to change, and for which the members of the alleged class have no responsibility. While criminal defendants who choose to enter into a plea agreement may find themselves as part of group of "plea bargainers," that group is defined by one particular activity that results from the individual's choices and situtation.

Thus, the plaintiff's complaint fails to state a claim under §1985(3), and should be dismissed, where plaintiff has not alleged sufficient facts indicating a conspiracy by the defendants, any act in furtherance of such a conspiracy, or any racial or class-based animus. Similarly, plaintiff also fails to state a claim under 42 U.S.C. § 1986. An indispensible prerequisite for a 42 U.S.C. § 1986 claim, under the express terms of the statute, is the existence of a conspiracy actionable under 42 U.S.C. § 1985. In light of the Court's finding as to plaintiff's §1985(3) claim, dismissal of the § 1986 claim is also

appropriate. See Wagar v. Hasenkrug, 486 F. Supp. 47, 51 (D. Mont. 1980).

III. Immunity from Suit

Absolute Immunity

Several of the defendants raise absolute immunity as an additional basis for dismissal of the plaintiff's complaint. In the context of claims brought under 42 U.S.C. §§ 1983 and 1985, courts have granted absolute immunity to judges, and absolute quasi-judicial immunity to those who have comparable functions, in order to promote independent decision making free from undue influence, to prevent unfounded litigation, and to protect against disabling threats. See Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967).

In addressing the defendants' arguments, the Court divides the defendants into two groups, based on the nature of their function, in order to determine the applicability of the type of immunity claimed. The first group consists of Utah State Court Judges Cornaby, Rigtrup, Sawaya, Tibbs, Murphy and Wahlquist and

United States District Court Judge Sam, who all claim absolute judicial immunity from suit. The second group, claiming absolute quasi-judicial immunity, consists of "non-judicial" defendants Namba, prosecutor; Valeika, AP&P investigator; and Haun and Sibbett, parole board members.

"[J]udicial immunity is an immunity from suit, not just from an ultimate assessment of damages." Mireles v. Waco, 112 S.Ct. 286, 288 (1991). "The appropriate inquiry in determining whether a particular judge is immune is whether the challenged action was 'judicial,' and whether at the time the challenged action was taken, the judge had subject matter jurisdiction." Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986). In other words, judges are liable only when their actions are taken in a non-judicial capacity or when they fall completely outside the scope of their jurisdiction; however, judges are entitled to absolute immunity "even when their action is erroneous, malicious, or in excess of their judicial authority." Id.; accord Mireles, 112 S.Ct. at 288; Pierson, 386 U.S. at 554. In determining whether an act performed by a judge is a "judicial" one, the court must decide whether the act "is a function normally performed by a

judge," examining the "'nature' and 'function' of the act, [and] not the 'act itself.'" Mireles, 112 S.Ct. at 288 (quoting Stump v. Sparkman, 435 U.S. 349, 362 (1978)).

Additionally, in applying the doctrine of judicial immunity to civil rights claims, no distinctions have been made between state and federal judges. Van Sickle, 791 F.2d at 1435. In Van Sickle, the Tenth Circuit examined the issue of judicial immunity for both state and federal judges who had been involved in hearing and deciding Van Sickle's underlying actions. The court determined that:

> Whether the allegations with respect to these defendants are considered under a Bivens type of constitutional tort theory, [citation omitted], or the allegations of a conspiracy are considered a violation of 42 U.S.C. §1985, the federal judges in this case are absolutely immune from liability. [Footnote omitted.] In Economou, [citation omitted], the Supreme Court stated that it is 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'

Van Sickle, 791 F.2d at 1435.

In the instant case, the plaintiff's Amended Complaint does not contain any allegations that the state and federal judges,

named as defendants, acted in a non-judicial capacity or outside the scope of their jurisdiction. In fact, this case provides the classic example for which the doctrine of judicial immunity was intended, i.e., to shield judges, such as the defendants in this case, from the harassment and intimidation of a disgruntled litigant who disagrees with the judicial action taken in his numerous underlying cases. Consequently, the doctrine of judicial immunity bars the plaintiff's claims against Utah State Court Judges Cornaby, Rigtrup, Sawaya, Tibbs, Murphy and Wahlquist, and United States District Court Judge Sam.

Moreover, the doctrine of absolute immunity has been extended to non-judicial state actors in limited circumstances. Applying a "functional" approach to questions of absolute immunity, the Supreme Court has determined that "'[i]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.'" Valdez v. City and County of Denver, 878 F.2d 1285, 1287 (10th Cir. 1989). "Accordingly, the Supreme Court has recognized not only the absolute civil immunity of judges for conduct within their judicial domain,. . . but also the 'quasi-judicial' civil

immunity" of such individuals as prosecutors, witnesses, jurors, agency officials, probation officers and parole board members, for those acts that are considered "intertwined with the judicial process." Id.; see also Imbler, 424 U.S. at 431 (prosecutor absolutely immune from damages under § 1983 for his or her actions in initiating a prosecution and presenting the state's case); Knoll v. Webster, 838 F.2d 450, 451 (10th Cir. 1988) (parole board members have absolute quasi-judicial immunity from "damages liability for actions taken in performance of the [b]oard's official duties regarding the granting or denying of parole"); Tripati v. United States I.N.S., 784 F.2d 345, 348 (10th Cir. 1986) (probation officer's preparation of presentence report intimately associated with judicial phase of criminal process, thereby entitling said officer to absolute immunity), cert. denied, 484 U.S. 1028 (1988).

Defendants Namba, Valeika, Haun and Sibbett argue that they are entitled to absolute quasi-judicial immunity for their respective roles as a prosecutor, probation investigator and parole board member. The primary allegations in the plaintiff's complaint that concern defendant Namba center on Namba's role as

the prosecuting attorney in plaintiff's underlying criminal action. Plaintiff alleges that Namba (1) conspired to nullify plaintiff's plea bargain; (2) recommended plaintiff's defense counsel, Steve Vanderlinden; (3) prepared the June 21, 1988 affidavit; and (4) drafted the original charge affidavit. It is clearly established that a prosecutor is absolutely immune from damages liability for any actions associated with the prosecution of a defendant in a criminal action, including negotiating a plea bargain. Buckley v. Fitzsimmons, 113 S.Ct. 2606, 2615 (1993); Imbler, 424 U.S. at 431; Dicesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993); Hammond v. Bales, 843 F.2d 1320, 1321-22 (10th Cir. 1988). In the instant case, the Court finds that defendant Namba's actions, as alleged in the complaint, occurred while he was acting in his role as an advocate for the state. Accordingly, defendant Namba is entitled to absolute immunity from liability for those actions.

Similarly, plaintiff's claims against defendant Valeika are based on her actions in exercising her responsibilities as an Adult Probation and Parole investigator in preparing the plaintiff's presentence report. Probation officers who assist

the court in sentencing determinations perform critical roles in the judicial process in criminal cases. Tripati, 784 F.2d at 348. In fact, "'[a] presentence report is prepared exclusively at the discretion of and for the benefit of the court.'" Id. (quoting United States v. Dingle, 546 F.2d 1378, 1380-81 (10th Cir. 1976)). Thus, the defendant Valeika is absolutly immune from civil liability where her activity in preparing plaintiff's presentence report was so intimately associated with the judicial process.

Finally, plaintiff alleges claims against defendants Haun and Sibbett for actions taken in their roles as parole board members in conducting the plaintiff's parole hearings. Due to the "judicial" nature of parole hearings, the Tenth Circuit held in Knoll v. Webster, that members of a parole board have absolute immunity "from damages liability for actions taken in performance of the [b]oard's official duties regarding the granting or denying of parole." 838 F.2d at 451; accord Russ v. Uppah, 972 F.2d 300, 303 (10th Cir. 1992). Here, the Court finds that defendants Haun and Sibbett are absolutely immune from civil liability for their actions as parole board members.

Qualified Immunity

State defendants, assistant attorneys general, Larsen, Micklos, Miller, Torgensen and Carlson; court clerk, Ludwig; and Department of Corrections officials DeLand, McCotter, Barnes and Van Der Veur, argue that, as state officials, they are protected from plaintiff's claims by the doctrine of qualified or "good faith" immunity.

The doctrine of qualified or "good faith" immunity was established in order to, under certain circumstances, shield public officers charged with discretionary functions from the liability and burdens associated with trial so as to avoid undue interference with their duties. E.g., Beard v. City of Northglenn, Colo., 24 F.3d 110, 113 (10th Cir. 1994). Under the objective standard for qualified immunity established in Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court identified a two-fold inquiry:

> A public officer will only be held liable for his conduct if it can be shown [1] that he trenched upon a plaintiff's clearly established constitutional or statutory right and [2] if a reasonable person in the defendant officer's position would have known his conduct violated that right.

Beard, 24 F.3d at 114; accord Bruning v. Pixler, 949 F.2d 352, 356 (10th Cir. 1991), cert. denied, 112 S.Ct. 1943 (1992); Salmon v. Schwarz, 948 F.2d 1131, 1135 (10th Cir. 1991); Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir. 1990), cert. denied, 449 U.S. 976 (1991). Whether the defendant is entitled to qualified immunity is a "legal, not a factual, issue which must be resolved in the first instance by the trial court." Snell, 920 F.2d at 696.

Because the doctrine of qualified immunity is designed to protect a defendant from both liability and suit, "prior to filing an affirmative defense, a defendant can challenge a complaint by filing either a motion to dismiss or a motion for summary judgment if the plaintiff has failed to come forward with **facts or allegations that establish that the defendant has violated clearly established law.**" Sawyer v. County of Creek, 908 F.2d 663, 665 (10th Cir. 1990) (emphasis supplied); accord Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642, 646 (10th Cir. 1988). "When the defense of qualified immunity has been raised by the defendant, the plaintiff then has the burden to show with particularity facts and law establishing the

inference that the defendants violated a constitutional right." Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir. 1994). Thus, "[u]nless and until the plaintiff both demonstrates a clearly established right and comes forward with the necessary factual allegations, the 'governmental official is properly spared the burden and expense of proceeding any further.'" Sawyer, 908 F.2d at 666 (quoting Powell v. Mikulecky, 891 F.2d 1454, 1457 (10th Cir. 1989)); Pueblo Neighborhood Health Centers, 847 F.2d at 646.

In light of this Court's earlier finding concerning the deficiencies of the plaintiff's amended complaint, it is evident that the plaintiff has failed to allege sufficient facts supporting a claim that the defendants violated clearly established law. The plaintiff must do more than "simply allege abstract violations." Guffey v. Wyatt, 18 F.3d 869, 871 (10th Cir. 1994). Additionally, where the plaintiff fails to allege sufficient facts to support a claim that the "conduct complained of violated the law as presently interpreted, it is unnecessary to consider whether the law was clearly established at the time such conduct occurred." Snell, 920 F.2d at 696 n.21.

The Court finds that state defendants, Larsen, Micklos,

Miller, Torgensen, Carlson, Ludwig, DeLand, McCotter, Barnes and Van Der Veur, are entitled to qualified immunity from suit[5] because the amended complaint is completely void of sufficient factual allegations to support a claim that these defendants violated clearly established law.

IV. Other Grounds for Dismissal

Defendant Edmonds, who acted as plaintiff's appellate counsel, argues that he should be dismissed from this action because (1) he was not a "state actor," for purposes of § 1983 liability, and (2) the plaintiff's vague and conclusory

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[5]In Bisbee v. Bey, 39 F.3d 1096 (10th Cir. 1994), the Tenth Circuit expressly held that the doctrine of qualified immunity applies in the context of both § 1983 and § 1985 claims. The rationale adopted by the court was that:

> The justifications for the doctrine of qualified immunity enunciated in Harlow are equally present in section 1985 claims regardless of the added requirement of racial or class-based animus. If public officials are not allowed to assert qualified immunity under section 1985, then suits may divert these officials' energies away from their public obligations; individuals will be deterred from holding public office; and officials will be chilled in the exercise of their duties.

Id. at 1102.

allegations concerning an alleged conspiracy are insufficient to state a cause of action against him.

It is clearly established that to state a cause of action under 42 U.S.C. § 1983, the plaintiff must allege that Edmonds violated a constitutional right while acting under color of state law. Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991). A lawyer does not act under color of state law when performing his or her traditional functions as counsel to a defendant in a criminal proceeding, or appeal therefrom. See Polk County v. Dodson, 454 U.S. 312, 325 (1981); Hunt v. Bennett, 17 F.3d 1263, 1268 (10th Cir. 1994), cert. denied, 115 S.Ct. 107 (1994). One noted exception to the above-stated rule has been recognized where criminal defense attorneys are involved in conspiratorial acts with state officials, which results in the deprivation of their client's constitutional rights. Tower v. Glover, 467 U.S. 914, 923 (1984). This exception does not apply here, where the Court has already determined that the plaintiff has inadequately pled a conspiracy claim. Plaintiff's claim against defendant Edmonds should, therefore, be dismissed.

Additionally, plaintiff fails to state a claim against

defendant Sheffield, who functions as the Executive Director, Secretary and Examiner of the Utah Judicial Conduct Commission. Unquestionably, the authority and jurisdiction of the Judicial Conduct Commission, as conferred by statute, does not extend to providing habeas corpus relief to prisoners. See Utah Code Ann. §§ 78-7-27 to 78-7-30. Since the Commission has no authority or control over the decision process affecting the plaintiff's incarceration, it is inconceivable that defendant Sheffield participated in the alleged conspiracy or committed any act depriving plaintiff of a constitutional right. Thus, in addition to the other grounds for dismissal set forth above, plaintiff's claims against Sheffield should be dismissed because there is no affirmative link between the alleged constitutional deprivation and any acts of Sheffield in his capacity as a member of the Judicial Conduct Commission. Durre v. Dempsey, 869 F.2d 543, 548 (10th Cir. 1989); accord Ruark, 928 F.2d at 950; Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988); Gomm v. DeLand, 729 F. Supp. 767, 782 (D. Utah 1990), aff'd, 931 F.2d 62 (10th Cir. 1991).

Similarly, plaintiff also fails to state a cause of action

against defendant Ferrero, of the Utah State Bar. Ferrero's role in responding to plaintiff's complaints against Assistant Attorneys General Larsen, Miller and Carlson in no way connects him with the constitutional violations alleged in the complaint. Again, plaintiff failed to establish the requisite affirmative link between acts of defendant Ferraro and the alleged constitutional deprivation; therefore, the claims against Ferrero should be dismissed. Durre, 869 F.2d at 548; accord Ruark, 928 F.2d at 950; Meade, 841 F.2d at 1527-28; Gomm, 729 F. Supp. at 782.

As to the other grounds for dismissal raised by the defendants, i.e., insufficiency of service of process, statute of limitations and Eleventh Amendment immunity, this Court has determined that in light of the findings set forth above, it is unnecessary to address these additional grounds.

RECOMMENDATION

Plaintiff has agreed to dismiss defendant Vanderlinden from the action due to Mr. Vanderlinden's present incapacity. The Court finds that dismissal of plaintiff's amended complaint,

pursuant to Fed. R. Civ. P. 12(b)(6), is appropriate as to all of the remaining defendants for the following reasons: (1) plaintiff does not have a cognizable claim under § 1983 because plaintiff's underlying criminal sentence has not been invalidated; (2) plaintiff does not state a cause of action under §§ 1985 or 1986 because he has not alleged sufficient facts indicating a conspiracy by the defendants, any act in furtherance of such a conspiracy, or any racial or class-based animus; (3) the state and federal court judges named as defendants are entitled to absolute judicial immunity; (4) defendants Namba, Valeika, Haun and Sibbett are entitled to absolute quasi-judicial immunity; (5) the remaining state defendants are entitled to qualified immunity because the factual allegations in the amended complaint are insufficient to support a claim that these defendants violated clearly established law; (6) defendant Edmonds is not a state actor for purposes of § 1983 liabilty; and (7) there is no affirmative link between the acts of defendant Sheffield, as a member of the Judicial Conduct Commission, or defendant Ferrero, of the Utah State Bar, and any alleged constitutional deprivation. Therefore,

IT IS HEREBY RECOMMENDED that the plaintiff's amended complaint be **dismissed** without prejudice. Additionally, in light of the fact that plaintiff has already been afforded the opportunity to remedy the pleading defects in his complaint, which he failed to do, this Court also recommends that Fed. R. Civ. P. 11 sanctions be imposed should plaintiff seek to file a further amended complaint without remedying the pleading defects as to the conspiracy claim.

A copy of the foregoing report and recommendation is being mailed to the parties who are hereby notified of their right to object to the report and recommendation. The parties are further notified that they must file any objections to the report and recommendation within ten (10) days after receiving it. Failure to file objections to both factual and legal findings may constitute a waiver of those objections on subsequent review.

DATED this 13th day of February, 1995.

Samuel Alba

Samuel Alba
United States Magistrate Judge

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing Report and Recommendation to:

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DATED this 13th day of February, 1995.

Secretary